

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**BANK OF MONTREAL**

**Applicant**

**- and -**

**PORTOFINO CORPORATION**

**Respondent**

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**MOTION RECORD  
(MOTION RETURNABLE DECEMBER 13, 2013)**

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**SERVICE LIST**

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<b>AND TO:</b>	<p><b>Bartlet &amp; Richardes LLP</b> 1000 Canada Building 374 Ouellette Avenue Windsor, ON N9A 1A9</p> <p><b>Elizabeth Musyj</b> Tel: 519.253.7461 Fax: 519.253.2321 Email: emusyj@bartlet.com</p> <p>Lawyers for the Estate of Patrick D'Amore</p>
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AND TO:	<b>Harrison Pensa LLP</b> 450 Talbot Street London, ON N6A 4K3  <b>Timothy C. Hogan</b> Tel: 519.661.6743 Fax: 519.667.3362 Email: thogan@harrisonpensa.com
AND TO:	<b>Shulgan Martini Marusic LLP</b> 2491 Ouellette Avenue Windsor, ON N8X 1L5  <b>Claudio Martini</b> Tel: 519.969.1817 Fax: 519.969.9655 Email: cmartini@smmbarristers.com
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AND TO:	<b>Oswaldo Rizzo</b> 4000 North Talbot Road Oldcastle, ON N0R 1L0
AND TO:	<b>Lombard General Insurance Company of Canada (Now Northbridge General Insurance Corporation)</b> 105 Adelaide Street West Toronto, ON M5H 1P9
AND TO:	<b>Remo Valente Real Estate (1990) Limited</b> 2985 Dougall Avenue Windsor, ON N9E 1S1
AND TO:	<b>Royal Bank of Canada</b> 383 Richmond Street London, ON N6A 3C4

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

PORTOFINO CORPORATION

Respondent

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**TAB “1”**



**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

PORTOFINO CORPORATION

Respondent

APPLICATION UNDER Section 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 December 13, 2013)**

**BDO CANADA LIMITED** ("**BDO**"), in its capacity as court-appointed receiver (the "**Receiver**") of the assets, undertakings and properties of Portofino Corporation ("**Portofino**" or the "**Debtor**") pursuant to the Order of The Honourable Justice Thomas dated October 29, 2013 (the "**Appointment Order**") will make a motion to The Honourable Justice Thomas to be heard on Friday, December 13, 2013 at 10:00 a.m. or as soon after that time as the motion can be heard, at the Courthouse, 245 Windsor Avenue, Windsor, Ontario.

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

THE MOTION IS FOR:

- (a) the advice and direction of the Court with respect to issues relating to a letter of credit posted by Bank of Montreal ("**BMO**") in the amount of \$2,000,000 (the "**Letter of Credit**") in favour of Remo Valente Real Estate (1990) Limited ("**Valente Real Estate**") as security for any judgment obtained by Valente Real Estate in Court Action No. 05-CV-5864CM (the "**Valente Court Action**"), including:

- (i) whether Valente Real Estate is contractually entitled to security for any judgment obtained in the Valente Court Action arising from the Defendant, Portofino's breach of the Exclusive Listing Agreement?
  - (ii) whether in the context of these receivership proceedings there remains any risk to Valente Real Estate that the property, assets and undertaking of Portofino will be dissipated or disposed of pending a trial of the remaining issues in the Valente Court Action?
  - (iii) whether maintaining the Letter of Credit in favour of Valente Real Estate as security for any judgment is contrary to public policy as it has the effect of reordering priorities among secured creditors of Portofino in a manner not provided for at law?
- (b) in the event this Court orders that the Letter of Credit be cancelled, the advice and direction of the Court as to the Receiver's future involvement in the trial of the Valente Court Action and the defence of the Valente Court Action;
- (c) in the event this Court orders that the Letter of Credit be cancelled, whether the Valente Court Action should be subject to the stay of proceedings created by the Appointment Order and whether the trial of the Valente Court Action, scheduled to take place in February, 2014, be adjourned until such time as the Court determines that funds remain after satisfaction of the secured claims to satisfy, in whole or in part, the claims of unsecured creditors;
- (d) an Order substantially in the form appended hereto as **Schedule "A"**:
- (i) if necessary, abridging the time for and validating the method of service of all motion confirmation forms, the Motion Record, including the Notice of Motion and the First Report of the Receiver dated December 6, 2013 and all appendices thereto (the "**First Report**"), and directing that any further service of same be dispensed with such that this motion is properly returnable on December 13, 2013;
  - (ii) approving the First Report and activities and conduct of the Receiver described therein;

- (iii) authorizing and directing the Receiver to enter into a property management agreement with Capaldi Investment Holdings Inc. ("**Capaldi Holdings**") with respect to the unsold units on terms to be negotiated between the Receiver and Capaldi Holdings;
- (iv) authorizing and directing the Receiver to negotiate and enter into a payment arrangement with the City of Windsor with respect to the payment of property tax arrears;
- (v) approving the Receiver's proposed sale process for the unsold units as set out in Section 5 of the First Report (the "**Sale Process**"), and authorizing the Receiver to carry out the Sale Process;
- (vi) discharging the mortgage registered in favour of Valente Real Estate as instrument number CE297353 in the Land Registry Office (Essex) No. 12 on October 12, 2007 in the amount of \$1,000,000 (the "**Mortgage**") and directing the Land Registrar to expunge the Mortgage from title to the real property listed on **Schedule "B"** hereto (the "**Property**");
- (vii) directing Valente Real Estate to reimburse Portofino the costs paid by Portofino to maintain the Letter of Credit in the amount of \$31,562.80 or such other amount as the Court determines is due to Portofino (the "**Letter of Credit Costs**");
- (viii) approving the Receiver's interim Statement of Receipts and Disbursements for Portofino for the period October 29, 2013 to November 28, 2013 (the "**Statement of Receipts and Disbursements**");
- (ix) approving the professional fees and disbursements of BDO as Receiver ("**BDO Fees**");
- (x) approving the professional fees and disbursements of Miller Thomson LLP ("**MT**"), counsel to the Receiver ("**MT Fees**" and collectively with the BDO Fees, the "**Professional Fees**"); and

- (xi) such further and other relief as counsel may advise and this Honourable Court may deem just;

THE GROUNDS FOR THE MOTION ARE:

Property Management Agreement for Unsold Units

- (a) prior to the appointment of the Receiver, Capaldi Holdings had acted as the property manager and leasing agent for the fifty-two (52) unsold units owned by Portofino (the “**Unsold Units**”);
- (b) there is no formal, written, property management agreement in place between Portofino and Capaldi Holdings;
- (c) in view of the knowledge and experience of Capaldi Holdings with the Portofino condominium building, and in particular, the Unsold Units, the Receiver recommends that Capaldi Holdings continue as property manager and leasing agent of the Unsold Units;
- (d) the Receiver seeks authorization to enter into a property management agreement with Capaldi Holdings on terms to be negotiated between the Receiver and Capaldi Holdings, in its sole discretion, acting reasonably;

Property Tax Arrears

- (e) at July 13, 2013, the outstanding property taxes owing to the City of Windsor were \$2,126,661.25;
- (f) the Receiver recommends that it be authorized to enter into an arrangement with the City of Windsor to address payment of the property tax arrears including outstanding and accruing penalties and interest;

Sale Process

- (g) the Unsold Units comprise forty-three (43) fully finished units and nine (9) unfinished units;

- (h) the Receiver is of the view that listing the Unsold Units with an experienced real estate agent(s) and exposing the Unsold Units through the Multiple Listing Service is the most effective method for the sale of the Unsold Units;
- (i) the Receiver will seek marketing proposals from three (3) to five (5) Windsor area real estate agents or teams experienced in selling high-end condominium units;
- (j) as required by sub-paragraph 3(k) of the Appointment Order, the Receiver consulted with the Essex County Condominium Corporation No. 122 ("**ECC 122**") with regards to the Sale Process;
- (k) the Receiver seeks an order approving the Sale Process, as detailed in section 5 of the First Report, and authorizing the Receiver to carry out the Sale Process;

Discharge of Security and Payment of Letter of Credit Costs

- (l) Portofino has complied with its obligations under the Order of Justice Quinn dated May 3, 2012 (the "**Quinn Order**") by maintaining the Letter of Credit (originally posted by BMO in October, 2010);
- (m) pursuant to the terms of the Quinn Order, Valente Real Estate is required to pay the costs associated with the Letter of Credit and to discharge its Mortgage from title to the Property;
- (n) Valente Real Estate has not paid all costs associated with the Letter of Credit and did not discharge the Mortgage as required by the terms of the Quinn Order;
- (o) the Letter of Credit Costs paid by Portofino total \$31,562.80 as at December 6, 2013;
- (p) the Quinn Order directs Valente Real Estate to discharge the Mortgage;
- (q) Portofino is insolvent and its assets are in the care, control and possession of the Receiver;

- (r) there is no longer any concern that Portofino's principals may dispose of Portofino's assets;
- (s) maintaining the Letter of Credit re-orders priorities without any justification for same at law;
- (t) maintaining the Letter of Credit would be contrary to public policy;
- (u) the remaining issue to be tried in connection with the Valente Court Action is whether the Defendants are liable for breach of contract;
- (v) Portofino did not grant Valente Real Estate security for amounts payable under the Exclusive Listing Agreement;
- (w) the Quinn Order is akin to a Mareva injunction which constitutes extraordinary relief;
- (x) no grounds exist to support the continuation of a Mareva injunction pending trial of the Valente Court Action;
- (y) the Receiver recommends that the Letter of Credit be cancelled and the trial of the Valente Court Action adjourned until the Property has been realized upon;
- (z) no prejudice will result to Valente Real Estate if the Letter of Credit is cancelled;
- (aa) by leaving the Letter of Credit in place, the Receiver is unable to complete its mandate;

Approval of the First Report, the Receiver's Activities and the Statements of Receipts and Disbursements

- (bb) The Receiver has carried out its duties and responsibilities in accordance with the terms of the Appointment Order;
- (cc) The Receiver seeks approval of the First Report and the Receiver's activities detailed therein;

- (dd) The Statement of Receipts and Disbursements are detailed in the First Report;

Approval of Professional Fees

- (ee) Pursuant to paragraph 19 of the Appointment Order, the Receiver and counsel to the Receiver were granted a first charge on the Property as security for the Professional Fees, both before and after the making of the Appointment Order;
- (ff) Pursuant to paragraph 20 of the Appointment Order, the accounts of the Receiver and its legal counsel must be passed from time to time by a judge of the Ontario Superior Court of Justice;
- (gg) The Receiver and its legal counsel have maintained detailed records of the Professional Fees;
- (hh) It is the Receiver's opinion that the Professional Fees are fair and reasonable and justified in the circumstances and accurately reflect the work performed by the Receiver and MT in connection with these receivership proceedings;

Other

- (ii) the Appointment Order;
- (jj) the Quinn Order;
- (kk) section 101 of the *Courts of Justice Act*;
- (ll) Section 243 of the *Bankruptcy and Insolvency Act*;
- (mm) rules 3, 4, 6, 11 and 13 of the *Bankruptcy and Insolvency General Rules*;
- (nn) rules 1.04, 1.05, 3.02(1), 16 and 37 of the *Ontario Rules of Civil Procedure*;  
and
- (oo) such other grounds as counsel may advise and this Honourable Court may permit.

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

- (a) the First Report, and the appendices attached thereto, dated December 6, 2013;
- (b) the fees Affidavit of Stephen N. Cherniak sworn December 5, 2013 and the exhibits attached thereto;
- (c) the fees Affidavit of Sherry A. Kettle sworn December 6, 2013 and the exhibits attached thereto;
- (d) all other pleadings and materials previously filed in these proceedings; and
- (e) such further and other evidence as counsel may advise and this Honourable Court may permit.

December 6, 2013

**MILLER THOMSON LLP**  
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255 Queens Avenue, Suite 2010  
London, ON Canada N6A 5R8

Alissa K. Mitchell LSUC#: 35104E  
Tel: 519.931.3510  
Fax: 519.858.8511

Lawyers for BDO Canada Limited, Court-Appointed Receiver of Portofino Corporation

TO: THE SERVICE LIST



**SCHEDULE "A"**

Court File No. CV-13-29866

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MR.	)	FRIDAY, THE 13TH
	)	
JUSTICE THOMAS	)	DAY OF DECEMBER, 2013

B E T W E E N:

**BANK OF MONTREAL**

Applicant

- and -

**PORTOFINO CORPORATION**

Respondent

**O R D E R**

THIS MOTION, made by BDO Canada Limited ("**BDO**"), in its capacity as Court-appointed receiver (the "**Receiver**") of the assets, undertakings and properties of Portofino Corporation ("**Portofino**") pursuant to the Order of the Honourable Justice Thomas dated October 29, 2013 (the "**Appointment Order**"), for, among other things, an order:

- (a) if necessary, abridging the time for and validating the method of service of all motion confirmation forms, the Motion Record, including the Notice of Motion and the First Report of the Receiver dated December 6, 2013 and all appendices thereto (the "**First Report**"), and directing that any further service of same be dispensed with such that this motion is properly returnable on December 13, 2013;
- (b) approving the First Report and activities and conduct of the Receiver described therein;
- (c) authorizing and directing the Receiver to enter into a property management agreement with Capaldi Investment Holdings Inc. ("**Capaldi Holdings**") with

respect to the unsold units on terms to be negotiated between the Receiver and Capaldi Holdings;

- (d) authorizing and directing the Receiver to negotiate and enter into a payment arrangement with the City of Windsor with respect to the payment of property tax arrears;
- (e) approving the Receiver's proposed sale process for the unsold units as set out in Section 5 of the First Report (the "**Sale Process**"), and authorizing the Receiver to carry out the Sale Process;
- (f) discharging the mortgage registered in favour of Valente Real Estate as instrument number CE297353 in the Land Registry Office (Essex) No. 12 on October 12, 2007 in the amount of \$1,000,000 (the "**Mortgage**") and directing the Land Registrar to expunge the Mortgage from title to the real property listed on **Schedule "A"** hereto (the "**Property**");
- (g) directing Valente Real Estate to reimburse Portofino the costs paid by Portofino to maintain the Letter of Credit in the amount of \$31,562.80 or such other amount as the Court determines is due to Portofino (the "**Letter of Credit Costs**");
- (h) approving the Receiver's interim Statement of Receipts and Disbursements for Portofino for the period October 29, 2013 to November 28, 2013 (the "**Statement of Receipts and Disbursements**");
- (i) approving the professional fees and disbursements of BDO as Receiver ("**BDO Fees**");
- (j) approving the professional fees and disbursements of Miller Thomson LLP ("**MT**"), counsel to the Receiver ("**MT Fees**" and collectively with the BDO Fees, the "**Professional Fees**"); and
- (k) such further and other relief as counsel may advise and this Honourable Court may deem just;

was heard this day at the Courthouse, 245 Windsor Avenue, Windsor Ontario.

ON READING the First Report and on hearing the submissions of counsel for the Receiver, and such other persons as may be present and on noting that no other persons appeared, although properly served as appears from the affidavit of Susan Jarrell sworn December 9, 2013, filed:

1. THIS COURT ORDERS that the time for and method of service of all motion confirmation forms, the Motion Record, including the Notice of Motion and the First Report, is hereby abridged and validated and any further service of same is hereby dispensed with such that this motion is properly returnable on December 13, 2013.
2. THIS COURT ORDERS that the First Report and the activities and conduct of the Receiver as set out therein are hereby approved.
3. THIS COURT ORDERS that the Receiver is hereby authorized to enter into a property management agreement with Capaldi Holdings with respect to the unsold units on terms to be negotiated between the Receiver and Capaldi Holdings.
4. THIS COURT ORDERS that the Receiver is hereby authorized and directed to negotiate a payment arrangement with the City of Windsor with respect to the property tax arrears.
5. THIS COURT ORDERS that the Sale Process is hereby approved and the Receiver is authorized to carry out the Sale Process.
6. THIS COURT ORDERS that the Mortgage is hereby discharged and the Land Registrar is hereby directed to expunge the Mortgage from title to Property.
7. THIS COURT ORDERS that Valente Real Estate is hereby directed to reimburse Portofino for the Letter of Credit Costs in the amount of \$31,562.80.
8. THIS COURT ORDERS that the Statement of Receipts and Disbursements is hereby approved.
9. THIS COURT ORDERS that the BDO Fees for the period commencing July 19, 2013 through November 28, 2013, as described in the First Report and in the Affidavit of Stephen N. Cherniak sworn December 5, 2013, and the MT Fees for the period September 9, 2013 to

November 15, 2013, as described in the First Report and the Affidavit of Sherry A. Kettle sworn December 6, 2013, are hereby approved.

---

Justice, Superior Court of Justice

*PIN* 01872 - 0001 LT  
*Description* UNIT 1, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0002 LT  
*Description* UNIT 2, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0003 LT  
*Description* UNIT 3, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0004 LT  
*Description* UNIT 4, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0005 LT  
*Description* UNIT 5, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0006 LT  
*Description* UNIT 6, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0052 LT  
*Description* UNIT 3, LEVEL 2, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0053 LT  
*Description* UNIT 4, LEVEL 2, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0058 LT  
*Description* UNIT 4, LEVEL 3, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

<i>PIN</i>	01872 - 0063 LT
<i>Description</i>	UNIT 9, LEVEL 3, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0065 LT
<i>Description</i>	UNIT 1, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0066 LT
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<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0072 LT
<i>Description</i>	UNIT 8, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0082 LT
<i>Description</i>	UNIT 8, LEVEL 5, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0085 LT
<i>Description</i>	UNIT 1, LEVEL 6, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0087 LT
<i>Description</i>	UNIT 3, LEVEL 6, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0095 LT
<i>Description</i>	UNIT 1, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0098 LT
<i>Description</i>	UNIT 4, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR

<i>PIN</i>	01872 - 0102 LT
<i>Description</i>	UNIT 8, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0107 LT
<i>Description</i>	UNIT 3, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0108 LT
<i>Description</i>	UNIT 4, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0109 LT
<i>Description</i>	UNIT 5, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0110 LT
<i>Description</i>	UNIT 6, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0115 LT
<i>Description</i>	UNIT 1, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0117 LT
<i>Description</i>	UNIT 3, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0118 LT
<i>Description</i>	UNIT 4, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0120 LT
<i>Description</i>	UNIT 6, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR

<i>PIN</i>	01872 - 0123 LT
<i>Description</i>	UNIT 1, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0124 LT
<i>Description</i>	UNIT 2, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0130 LT
<i>Description</i>	UNIT 8, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0131 LT
<i>Description</i>	UNIT 1, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0132 LT
<i>Description</i>	UNIT 2, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0134 LT
<i>Description</i>	UNIT 4, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0135 LT
<i>Description</i>	UNIT 5, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0138 LT
<i>Description</i>	UNIT 8, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0139 LT
<i>Description</i>	UNIT 1, LEVEL 12, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR



*PIN* 01872 - 0140 LT  
*Description* UNIT 2, LEVEL 12, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0145 LT  
*Description* UNIT 1, LEVEL 13, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0146 LT  
*Description* UNIT 2, LEVEL 13, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0147 LT  
*Description* UNIT 3, LEVEL 13, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0151 LT  
*Description* UNIT 1, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0152 LT  
*Description* UNIT 2, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0153 LT  
*Description* UNIT 3, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0154 LT  
*Description* UNIT 4, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0157 LT  
*Description* UNIT 1, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0158 LT  
*Description* UNIT 2, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0159 LT  
*Description* UNIT 3, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0161 LT  
*Description* UNIT 5, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0162 LT  
*Description* UNIT 1, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0163 LT  
*Description* UNIT 2, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0164 LT  
*Description* UNIT 3, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

*PIN* 01872 - 0166 LT  
*Description* UNIT 5, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
*Address* WINDSOR

**Document to be Discharged**

<i>Registration No.</i>	<i>Date</i>	<i>Type of Instrument</i>
CE297353	2007 10 12	Charge/Mortgage

**BANK OF MONTREAL**  
Applicant

**PORTOFINO CORPORATION**  
and  
Respondent

Court File No: CV-13-29866

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at WINDSOR

**ORDER**

**MILLER THOMSON LLP**  
One London Place  
255 Queens Avenue, Suite 2010  
London, ON Canada N6A 5R8

Alissa K. Mitchell LSUC#: 35104E  
Tel: 519.931.3510  
Fax: 519.858.8511

Lawyers for BDO Canada Limited, Court-Appointed  
Receiver of Portofino Corporation

SCHEDULE "B"

<i>PIN</i>	01872 - 0001 LT
<i>Description</i>	UNIT 1, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0002 LT
<i>Description</i>	UNIT 2, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0003 LT
<i>Description</i>	UNIT 3, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0004 LT
<i>Description</i>	UNIT 4, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0005 LT
<i>Description</i>	UNIT 5, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0006 LT
<i>Description</i>	UNIT 6, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0052 LT
<i>Description</i>	UNIT 3, LEVEL 2, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0053 LT
<i>Description</i>	UNIT 4, LEVEL 2, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR
<i>PIN</i>	01872 - 0058 LT
<i>Description</i>	UNIT 4, LEVEL 3, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
<i>Address</i>	WINDSOR

**PIN** 01872 - 0063 LT  
**Description** UNIT 9, LEVEL 3, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0065 LT  
**Description** UNIT 1, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0066 LT  
**Description** UNIT 2, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0072 LT  
**Description** UNIT 8, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0082 LT  
**Description** UNIT 8, LEVEL 5, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0085 LT  
**Description** UNIT 1, LEVEL 6, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0087 LT  
**Description** UNIT 3, LEVEL 6, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0095 LT  
**Description** UNIT 1, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0098 LT  
**Description** UNIT 4, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARACION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0102 LT  
**Description** UNIT 8, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0107 LT  
**Description** UNIT 3, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
**Address** WINDSOR

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**Description** UNIT 4, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0109 LT  
**Description** UNIT 5, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
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**PIN** 01872 - 0115 LT  
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**Address** WINDSOR

**PIN** 01872 - 0123 LT  
**Description** UNIT 1, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0124 LT  
**Description** UNIT 2, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0130 LT  
**Description** UNIT 8, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
**Address** WINDSOR

**PIN** 01872 - 0131 LT  
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**Address** WINDSOR

**PIN** 01872 - 0132 LT  
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**Address** WINDSOR

**PIN** 01872 - 0134 LT  
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**Address** WINDSOR

**PIN** 01872 - 0135 LT  
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**Address** WINDSOR

**PIN** 01872 - 0138 LT  
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**Address** WINDSOR

**PIN** 01872 - 0139 LT  
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**Address** WINDSOR

*PIN* 01872 - 0140 LT  
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*Address* WINDSOR

*PIN* 01872 - 0145 LT  
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*Address* WINDSOR

*PIN* 01872 - 0146 LT  
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*Address* WINDSOR

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*Description* UNIT 1, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123  
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**Address** WINDSOR

<b>Document to be Discharged</b>		
<i>Registration No.</i>	<i>Date</i>	<i>Type of Instrument</i>
CE297353	2007 10 12	Charge/Mortgage

**BANK OF MONTREAL**  
Plaintiff

**PORTOFINO CORPORATION**  
and  
Defendant

Court File No: CV-13-19866

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at WINDSOR

**NOTICE OF MOTION  
(RETURNABLE DECEMBER 13, 2013)**

**MILLER THOMSON LLP**  
One London Place  
255 Queens Avenue, Suite 2010  
London, ON Canada N6A 5R8

Alissa K. Mitchell LSUC#: 35104E  
Tel: 519.931.3510  
Fax: 519.858.8511

Lawyers for BDO Canada Limited, Court-Appointed  
Receiver of Portofino Corporation

**TAB "2"**

Court File No. CV-13-19866

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**BANK OF MONTREAL**

**Applicant**

- and -

**PORTOFINO CORPORATION**

**Respondent**

**FIRST REPORT TO THE COURT SUBMITTED BY BDO CANADA LIMITED,  
AS RECEIVER OF PORTOFINO CORPORATION**

**December 6, 2013**

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## 1. Introduction and Background

---

### 1.1 Introduction

- 1.1.1 This report is submitted by BDO Canada Limited, in its capacity as Receiver ("**BDO**" or the "**Receiver**") of the assets, undertakings and properties of Portofino Corporation ("**Portofino**", "**Portofino 2**" or the "**Company**") acquired for or used in relation to a business carried on by Portofino, including all proceeds thereof (the "**Property**").
- 1.1.2 On application of Bank of Montreal ("**BMO**"), BDO was appointed as receiver by the Order of the Honourable Mr. Justice Thomas dated October 29, 2013 (the "**Appointment Order**"). A copy of the Appointment Order is attached as **Appendix A** to this report.

### 1.2 Background

- 1.2.1 At all material times, Portofino was engaged in the development of a 123 unit luxury residential condominium project known as "Portofino" (the "**Portofino Condominium**" or the "**Project**"), located at 1225 Riverside Drive West in the City of Windsor, Ontario (the "**Lands**").
- 1.2.2 Portofino Condominium was originally a partnership comprised of Dr. Dante Capaldi ("**Capaldi**") and three (3) other parties as partners. On or about January 1, 2005, Capaldi bought out his former partners and acquired two (2) new partners, namely Mr. Patrick D'Amore ("**D'Amore**") and Mr. Ozvaldo Rizzo ("**Rizzo**") who invested in the project.
- 1.2.3 Since 2005, there has been ongoing litigation commenced by one (1) of the original partners, Remo Valente Real Estate (1990) Limited ("**Valente Real Estate**") as plaintiff against Capaldi, Portofino, Portofino Riverside Tower Inc. ("**Portofino 1**")

and Westview Park Gardens (2004) Inc. ("**Westview Park**"), as defendants in Court Action No. 05-CV-5864CM (the "**Valente Court Action**").

- 1.2.4 BMO provided construction financing to the Project under a commitment letter dated August 3, 2005 (the "**Commitment Letter**"). The financing consisted of demand loan facilities totalling \$27,325,000 (the "**BMO Credit Facility**").
- 1.2.5 As security for the BMO Credit Facility, Portofino granted to BMO, among other security a first mortgage over the Lands and a General Security Agreement. In addition, Capaldi, D'Amore and Rizzo provided their personal guarantees.
- 1.2.6 Construction of the Portofino Condominium was completed in 2007, but not all individual units were completed. Essex Standard Condominium Corporation No. 122 ("**ECC 122**") was registered and the closing of sales of units commenced in July, 2007. At the time of the Receiver's appointment on October 29, 2013, nine (9) units remained unfinished.
- 1.2.7 Portofino appears to have over-estimated the demand for luxury condominium units in the Windsor, Ontario market. In addition, the economic downturn in 2008 and appreciation of the Canadian dollar relative to the U.S. dollar negatively impacted sales. As at the date of this First Report, fifty-two (52) condominium units remain unsold and owned by Portofino (the "**Unsold Units**").
- 1.2.8 In view of the difficulty in selling the Unsold Units and Portofino's ability to repay the BMO Credit Facility, BMO amended the BMO Credit Facility on January 8, 2008, March 5, 2009, December 30, 2010, October 17, 2011, February 28, 2012, March 19, 2013 and April 15, 2013.
- 1.2.9 Portofino failed to pay property taxes to the City of Windsor over a period of several years and has accumulated tax arrears exceeding \$2.1 million (the "**Tax Arrears**").



- 1.2.10 The provision of the personal guarantee of D'Amore, in the amount of \$27,325,000, was a condition of the Commitment Letter (the "**D'Amore Guarantee**"). D'Amore passed away on July 11, 2011.
- 1.2.11 On July 13, 2013, Mr. Scott D'Amore ("**Scott**") in his capacity as Estate Trustee of the Estate of Patrick D'Amore, delivered notice to BMO of the Estate's intention to revoke the D'Amore Guarantee.
- 1.2.12 The failure to pay property taxes and the revocation of the D'Amore Guarantee are breaches of the BMO Credit Facility and constitute Events of Default. Accordingly, on July 26, 2013, BMO made demand for repayment of the BMO Credit Facility.
- 1.2.13 As at September 6, 2013, Portofino was indebted to BMO in the approximate amount of \$11,841,000 including the Letter of Credit in the amount of \$2,000,000 posted by BMO in connection with the Valente Court Action (the "**Letter of Credit**").
- 1.2.14 An application was brought by BMO for the appointment of BDO as Receiver and Manager of Portofino to ensure that the Unsold Units are sold in an orderly fashion and that their sale is not prevented or delayed by litigation proceedings.
- 1.2.15 As noted above, on October 29, 2013, the Honourable Mr. Justice Thomas granted the relief sought by BMO and issued the Appointment Order.
- 1.2.16 Among other things, the Appointment Order empowers but does not obligate the Receiver to:
- (a) take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
  - (b) receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) manage, operate and carry on the business of the Company, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Company, and to complete minor repairs or construction as may be required to release and/or reduce security held for the Company's obligations under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. 0.31, as amended;
- (d) receive and collect all monies and accounts now owed or hereafter owing to the Company and to exercise all remedies of the Company in collecting such monies, including, without limitation, to enforce any security held by the Company;
- (e) in consultation with ECC 122, market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate, with the opinions of ECC 122 not being binding upon the Receiver; and
- (f) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business without the approval of this Court in respect of any transaction not exceeding \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$200,000, and with the approval of the Court in which the purchase price exceeds these monetary thresholds.

## 2. Terms of Reference

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2.1 In preparing this First Report, the Receiver has relied upon unaudited and draft, internal financial information obtained from the Portofino's books and records and discussions with former management and staff (the "**Information**"). The Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information and expresses no opinion, or other form of assurance, in respect of the Information.

### **3. Purpose of the Receiver's First Report**

---

3.1 This constitutes the Receiver's First Report to the Court (the "First Report") in this matter and is filed:

- (a) To provide this Court with information on, among other things:
  - (i) the Receiver's activities since its appointment;
  - (ii) the arrangements in place for the ongoing property management of the Portofino Condominium;
  - (iii) the status of the property tax arrears of Portofino;
  - (iv) the status of condominium fees payable by Portofino to ECC 122; and
  - (v) The Receiver's proposed plan for the marketing and sale of the Unsold Units;
- (b) In support of:
  - (i) the advice and direction of the Court with respect to issues relating to the Letter of Credit in favour of Valente Real Estate as security for any judgment obtained by Valente Real Estate in the Valente Court Action, including:
    - (A) whether Valente Real Estate is contractually entitled to security for any judgment obtained in the Valente Court Action arising from the Defendant, Portofino's breach of the Exclusive Listing Agreement?
    - (B) whether in the context of these receivership proceedings there remains any risk to Valente Real Estate that the property, assets and undertaking of Portofino will be dissipated or disposed of pending a trial of the remaining issues in the Valente Court Action?
    - (C) whether maintaining the Letter of Credit in favour of Valente Real Estate as security for any judgment is contrary to public

policy as it has the effect of reordering priorities among secured creditors of Portofino in a manner not provided for at law?

- (ii) in the event this Court orders that the Letter of Credit be cancelled, the advice and direction of the Court as to the Receiver's future involvement in the trial of the Valente Court Action and the defence of the Valente Court Action;
- (iii) in the event this Court orders that the Letter of Credit be cancelled, whether the Valente Court Action should be subject to the stay of proceedings created by the Appointment Order and whether the trial of the Valente Court Action, scheduled to take place in February, 2014, be adjourned until such time as the Court determines that funds remain after satisfaction of the secured claims to satisfy, in whole or in part, the claims of unsecured creditors;
- (iv) an Order, substantially in the form appended as Schedule "A" to the Notice of Motion:
  - (A) approving the First Report and activities and conduct of the Receiver described therein;
  - (B) authorizing and directing the Receiver to enter into a property management agreement with Capaldi Investment Holdings Inc. ("**Capaldi Holdings**") with respect to the unsold units on terms to be negotiated between the Receiver and Capaldi Holdings;
  - (C) authorizing and directing the Receiver to negotiate and enter into a payment arrangement with the City of Windsor with respect to the payment of property tax arrears;
  - (D) approving the Receiver's proposed sale process for the unsold units as set out in Section 5 of the First Report (the "**Sale Process**"), and authorizing the Receiver to carry out the Sale Process;
  - (E) discharging the mortgage registered in favour of Valente Real Estate as instrument number CE297353 in the Land Registry Office (Essex) No. 12 on October 12, 2007 in the amount of \$1,000,000 (the "**Mortgage**") and directing the Land Registrar to expunge the Mortgage from title to the real property listed on Schedule "B" to the Notice of Motion (the "**Real Property**");
  - (F) directing Valente Real Estate to reimburse Portofino the costs paid by Portofino to maintain the Letter of Credit in the amount

of \$31,562.80 or such other amount as the Court determines is due to Portofino (the "**Letter of Credit Costs**");

- (G) approving the Receiver's interim Statement of Receipts and Disbursements for Portofino for the period October 29, 2013 to November 28, 2013 (the "**Statement of Receipts and Disbursements**");
- (H) approving the professional fees and disbursements of BDO as Receiver ("**BDO Fees**"); and
- (I) approving the professional fees and disbursements of Miller Thomson LLP ("**MT**"), counsel to the Receiver ("**MT Fees**" and collectively with the BDO Fees, the "**Professional Fees**").

## 4. Receiver's Activities

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- 4.1 At the time of the Receiver's appointment, Capaldi Holdings had been retained by ECC 122 as the property manager of the Portofino Condominium under a Property Management Agreement between ECC 122 and Capaldi Holdings dated June 1, 2008. This agreement is unaffected by the appointment of the Receiver.
- 4.2 Capaldi Holdings was also acting as the property manager and leasing agent for the 52 units owned by Portofino. There is no formal written agreement in place between Portofino and Capaldi Holdings. As property manager, Capaldi Holdings was responsible for the leasing of vacant units, collection of rents and supervision of maintenance and repairs to the leased units.
- 4.3 Following its appointment, representatives of the Receiver met with Capaldi Holdings and obtained information relating to the business operations and current status of Portofino. At that time, it was expressly stated by the Receiver to Capaldi Holdings that Capaldi Holdings (a) had been retained by the Receiver; (b) would report only to the Receiver; and (c) has no authority to make decisions or execute documents on behalf of or as agent for Portofino and/or BDO in its capacity as Receiver, without the prior approval of the Receiver.
- 4.4 Under the current arrangement in place between Portofino and Capaldi Holdings, there is no remuneration paid to Capaldi or Capaldi Holdings. Capaldi resides in Unit 1603 on a rent free basis, the market value of which is approximately \$3,250 per month.
- 4.5 In view of Capaldi's knowledge and experience with the Portofino Condominium, the Receiver recommends that Capaldi Holdings continue as property manager and leasing agent of the Unsold Units. The Receiver seeks authorization to enter into a property management agreement with Capaldi Holdings on terms to be negotiated between the Receiver and Capaldi Holdings.
- 4.6 Capaldi Holdings has four (4) employees whose duties include maintenance and labour at Portofino Condominium. These employees will continue to provide services to Portofino Condominium, with their hours for these services to be tracked

separately and invoiced to the Receiver.

- 4.7 As required by the terms of the Appointment Order, the Receiver opened a bank account at BMO.
- 4.8 Of the 52 Unsold Units, all but 2 of the 43 finished units are currently leased. The majority of tenants pay rent on the first of the month, with the exception of a few who pay mid-month. A rent roll for Unsold Units is attached as **Appendix B**.
- 4.9 For leasing purposes, Capaldi Holdings utilizes the standard form Ontario Real Estate Association Residential Lease supplemented by a schedule of additional terms and ECC 122 condominium rules. The current residential lease agreement is attached as **Appendix C**. Some tenants have completed their initial lease period and are renting on a 'month to month' basis.
- 4.10 The Receiver's legal counsel will prepare a standard residential lease agreement, with terms and conditions necessary for a Receiver, which will be utilized as Unsold Units become vacant and are re-leased. The Receiver will not enter into any lease agreement for a period exceeding one year.
- 4.11 At the time of the Receiver's appointment, all rents due on October 1, 2013 had been paid in full. Rents due on November 1, 2013 were collected by Capaldi Holdings, delivered to the Receiver and deposited to the Receiver's bank account for Portofino established with BMO.
- 4.12 Property taxes on the Unsold Units owned by Portofino have not been regularly paid and there are significant Tax Arrears dating back several years. At July 13, 2013, the outstanding property taxes owed to the City of Windsor were \$2,126,661.25.
- 4.13 The Receiver recommends that it be authorized to enter into a payment arrangement with the City of Windsor to address the property tax arrears.
- 4.14 The Receiver determined that insurance coverage for Portofino Condominium, including liability coverage, is carried by ECC 122. The Receiver obtained a copy of the policy declarations and renewal for the period August 9, 2013 to August 9, 2014.



- 4.15 Condominium common fees payable to ECC 122 by Portofino on the Unsold Units are currently \$15,857.00 per month. A schedule of the monthly common fees is attached as **Appendix D**. Portofino has accumulated significant arrears of the condominium fees and the outstanding balance at the time of the Receiver's appointment was approximately \$100,000. This balance includes legal fees and disbursements for ECC 122 to register liens against each of the Unsold Units.
- 4.16 The Receiver has paid the monthly common fees for November, 2013 and intends to pay the monthly common fees on a current basis going forward.
- 4.17 Pursuant to Section 245(1) and 246(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), on November 11, 2013, the Receiver sent notice of its appointment, in the prescribed form, to all known creditors of Portofino, the Superintendent of Bankruptcy and to Portofino.

## 5. Receiver's Proposed Sale Process

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- 5.1 The Unsold Units are comprised of 43 units that are fully finished (the "**Finished Units**") and 9 units that have not been completed. (the "**Unfinished Units**").
- 5.2 A schedule of the Unsold Units with list prices, as of July, 2013, is attached as **Appendix E**. This schedule includes Units 1601 and 1602, which are also unsold.
- 5.3 The Unfinished Units require substantial work to complete, including flooring, trim, kitchen cabinetry, appliances and other fixtures. The Receiver has no funding to complete the Unfinished Units and, given the sizeable inventory of Finished Units, the Receiver does not intend to complete the Unfinished Units at this time.
- 5.4 Portofino Condominium contains 13 different floor plans of varying sizes from 1,062 square feet to 2,450 square feet. The prices of units sold to date and the current list price of the Unsold Units depends on the floor plan, floor and direction of view. In general, a premium is charged for a higher floor and a view of the Detroit River.
- 5.5 Several of the Finished Units are currently listed for sale. However, since January, 2009 only three (3) Finished Units have been sold.
- 5.6 The Receiver obtained an appraisal of the Unsold Units prepared for Portofino by Finlay Appraisal and Consultation Service in August, 2013 (the "**Finlay Appraisal**"). In addition, the Receiver has commissioned a second appraisal of the Unsold Units by Metrix Realty Group (the "**Metrix Appraisal**"). The Receiver expects the Metrix appraisal to be completed in late December, 2013. Depending on the consistency of the two appraisals obtained, the Receiver will consider the need for a third appraisal.
- 5.7 The Receiver does not intend to sell the Unsold Units on an en bloc basis at discounted prices. The Receiver believes this would not be in the best interests of the stakeholders.
- 5.8 Notwithstanding the slow pace of recent sales, the Receiver is of the view that listing the Unsold Units with an experienced real estate agent(s) and exposing the units through the Multiple Listing Service is the most effective method for the sale of the

Unsold Units.

- 5.9 The Receiver will seek marketing proposals from three (3) to five (5) Windsor area real estate agents or teams experienced in selling higher end condominium units. In selecting agents to submit proposals, the Receiver will draw on its own professional experience as well as the input of the stakeholders of Portofino.
- 5.10 The Receiver intends to list only ten (10) to fifteen (15) units for sale at one time, with a variety of lower and upper level units and floor plans.
- 5.11 The Receiver will select one real estate agent or team based on, but not limited to, the following criteria: (a) professional experience and sales history; (b) depth and credibility of the proposed marketing plan; (c) commission structure; and (d) marketing cost proposal;
- 5.12 In listing the Unsold Units for sale, the marketing of the Unsold Units should be reviewed and enhanced from its current state. In addition, the current list prices should be reviewed relative to recent sales, market conditions, the Finlay Appraisal, the Metrix Appraisal and the input of the selected real estate agent.
- 5.13 In the event a potential purchaser expresses interest in an Unsold Unit that is not listed for sale, the Receiver will attempt to negotiate and complete a sale on commercially reasonable terms.
- 5.14 As noted above, pursuant to paragraph 3(k) of the Appointment Order, the Receiver is required to consult with ECC 122 in respect to marketing the Property. However, the advice and opinions of ECC 122 are not binding on the Receiver.
- 5.15 The Receiver discussed the Sale Process with Dr. Paul Cassano, President of ECC 122, and he agrees with the Receiver's proposed Sale Process.

## 6. Valente Court Action

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- 6.1 As noted above, there is ongoing litigation between Valente Real Estate, as plaintiff, and Capaldi, Portofino 1, Portofino 2 and Westview Park, as defendants. (the “**Defendants**”).
- 6.2 By way of background, Valente Real Estate entered into a listing agreement with Portofino 1 in November, 2002 to sell the condominium units to be built by Portofino 1 on land owned by it (the “**Listing Agreement**”). Attached hereto as **Appendix F** is a copy of the Listing Agreement and the amendment thereto.
- 6.3 Due to problems among the four shareholders of Portofino 1, Capaldi exercised his right under a shotgun clause in a shareholders’ agreement to purchase all of the shares of the other three shareholders. On or about January, 2005, Capaldi became the sole owner of Portofino 1.
- 6.4 On May 3, 2005, Portofino 1 reorganized by:
- (a) transferring legal title to the lands to Westview Park, now known as Portofino Corporation or Portofino 2, for nominal consideration;
  - (b) transferring the beneficial ownership of the lands and all other assets of Portofino 1 to Portofino (2005) Limited Partnership (the “**Limited Partnership**”).
- 6.5 The general partner of the Limited Partnership is I Capaldi General Partner Corporation (the “**General Partner**”). In addition to Portofino 1, Capaldi owned Portofino 2 and the General Partner.
- 6.6 On May 9, 2005, Portofino 2 locked Valente Real Estate’s agents out of the Project and retained another real estate agent.

- 6.7 By Agreement dated January 17, 2006, the Limited Partnership agreed to keep Portofino 1 fully protected, defended and indemnified against all amounts that Portofino 1 may be legally obligated to pay to Valente Real Estate, if any, in respect of real estate commissions payable pursuant to the Listing Agreement (the "**Indemnity**"). In addition, the Limited Partnership agreed to irrevocably direct its trustee, Portofino 2, to pay such amounts from the proceeds of the sale of the condominium units at issue in priority to any payment to the Limited Partnership (the "**Direction**"). Portofino 2 acknowledged the Direction. Attached hereto as **Appendix G** is a copy of the Indemnity and Direction.
- 6.8 Valente Real Estate sued the Defendants for, among other things, breach of contract in respect of the Listing Agreement and oppression. The trial judge addressed only the oppression claim, not the breach of contract claim. The trial judge concluded that Valente Real Estate was a creditor of Portofino 1 and thus was a "complainant" as that term is understood under the oppression remedy sections of the Ontario *Business Corporations Act*. Having found that the real reason that Portofino 1 was reorganized was to ensure that Portofino 1 was an empty shell so that Valente Real Estate would be unable to collect commissions owed to it, the trial judge concluded that the corporate restructuring constituted oppression and ordered immediate judgment against the Defendants in the amount of \$1 million (the "**Interim Judgment**"). Attached hereto as **Appendix H** is a copy of the Reasons for Judgment of Justice Brockenshire dated August 31, 2007 in respect of the Interim Judgment.
- 6.9 In the Interim Judgment dated August 31, 2007, the trial judge also ordered that the Defendants, jointly and severally, give security to the plaintiff against all of their assets in the amount of \$2 million for payment of further damages or loss to date for past, future and contingent commissions, accrued interest on unpaid accounts, prejudgment interest, costs and GST.
- 6.10 By order dated October 9, 2007 (the "**Security Order**"), the form of security was settled by the trial judge:
- (a) a Bank of Montreal Irrevocable Standby Letter of Credit No. BMT0191410OS in the total amount of \$2,000,000 (the "**Letter of Credit**"); and

- (b) a mortgage/charge registered by Portofino 2 in favour of the plaintiff against title to the Unsold Units in the principal amount of \$1,000,000 and interest thereon at 6% per year commencing on August 31, 2007, which mortgage is subject only to a first mortgage to BMO and a second mortgage to Lombard General Insurance Company of Canada and shall be enforceable only after Judgment, final from any appeal, as further security for the amounts found due to the plaintiff in the Judgment and may be found due to the plaintiff in the trial of issues in paragraph 4 of the Judgment

(collectively, the "**Security**"). Attached hereto as **Appendix I** is a copy of the Security Order of Mr. Justice Brockenshire.

- 6.11 The trial judge conducted a separate hearing for an accounting to determine the details needed to complete an assessment of damages against the Defendants. Justice Brockenshire issued Reasons for Decision dated May 13, 2008, a copy of which is attached hereto as **Appendix J**, in respect to his assessment of damages (the "**Accounting Judgment**").
- 6.12 On appeal to the Divisional Court, both the Judgment and the Accounting Judgment were set aside and Valente Real Estate's action was dismissed in its entirety. The Security was cancelled. Attached hereto as **Appendix K** is a copy of the Divisional Court Decision dated February 3, 2010.
- 6.13 The Court of Appeal dismissed the appeal in respect to the oppression claim, finding that it could not succeed. Having noted that it was unclear whether or not the Indemnification covers all obligations of Portofino 1 arising under the Listing Agreement, the Court of Appeal stated, at paragraphs 29 and 30:

"However, any lack of clarity was dispelled by the admissions of respondents' counsel in this court. They could not have been clearer. Counsel agreed that all three entities involved in the corporate restructuring – Portofino 1, Portofino 2 and the Limited Partnership – are bound by the exclusive listing agreement.

The consequence of these admissions is clear for the appellant's claim of oppression due to the corporate restructuring. The appellant can enforce any claim it properly has under the exclusive listing agreement against the same assets after the restructuring as before. It was not left by the restructuring to look only to an empty

shell. In these circumstances, its oppression claim cannot succeed.”

However, the Court of Appeal allowed the appeal in respect of the breach of contract claim only to the extent of remitting the breach of contract issue for trial. The Court of Appeal concluded that the trial judge did not address the findings of fact or the legal arguments that might be relevant to adjudicating Valente Real Estate’s breach of contract claim. Attached hereto as **Appendix L** is a copy of the Appeal Court Decision dated December 14, 2011.

- 6.14 By endorsement dated March 15, 2012, the Court of Appeal directed “that security should remain in place pending the outcome of the trial of the contract issue”. The court stated that “security” is an issue properly to be decided by the trial court in which the breach of contract issue will be heard. Accordingly, the Court of Appeal directed that the security remain in place temporarily to permit Valente Real Estate to move for security in the court below if so advised. Attached hereto as **Appendix M** is a copy of the Appeal Court Endorsement dated March 15, 2012.
- 6.15 On motion by Valente Real Estate in the Superior Court of Justice, the Honourable Mr. Justice Quinn heard arguments about the security issue. In his reasons, Justice Quinn notes that security as a general rule is not ordered in contract actions. The exception to this rule is where the court is persuaded that there is a real risk that the defendant will dispose of his assets in a manner not consistent with normal business practice. Justice Quinn determined that there were good reasons to leave security in place in light of the defendants’ past conduct designed to avoid payment under the Listing Agreement. Justice Quinn also determined that the only security required is a letter of credit which remained at \$2,000,000 with Valente Real Estate directed to continue to bear the costs of the security. Attached hereto as **Appendix N** is a copy of reasons for judgment of Justice Quinn dated May 4, 2012 (the “**Quinn Decision**”).
- 6.16 Paragraph 8 of the Quinn Decision states:

“... The courts, to date, in this matter to achieve security, have ordered a third mortgage, indemnity agreements, funds to be held in trust and a letter of credit. In my judgment the only security that is required is a letter of credit. The only issue with the letter of credit is the quantum.”

- 6.17 Portofino has complied with its obligations by maintaining the Letter of Credit and by registering the Mortgage.
- 6.18 Valente Real Estate is required by court order to pay the Letter of Credit Costs. Valente Real Estate has failed to pay all Letter of Credit Costs. The Letter of Credit Costs total \$31,562.80 as at December 6, 2013 comprised of out of pocket costs incurred to maintain the Letter of Credit, together with simple interest thereon calculated at the rate of 5% interest per annum. Attached hereto as **Appendix O** is a schedule provided to the Receiver by Bill Sasso, counsel for the Defendants, calculating the Letter of Credit Costs.
- 6.19 Counsel for the Receiver, Ms. Mitchell, has corresponded with counsel for Valente Real Estate, Mr. Morga, in respect to the Letter of Credit Costs. Despite the Receiver's request for payment of the Letter of Credit Costs, Valente Real Estate has failed to satisfy same.
- 6.20 The Receiver requests an Order directing Valente Real Estate to pay the balance of Letter of Credit Costs.
- 6.21 Despite being required by court order to discharge the Mortgage, Valente Real Estate has failed to do so. By e-mail dated November 29, 2013, Ms. Mitchell, sent an Application to Register Discharge of Charge ("**Application to Discharge Charge**") to Mr. Morga, and requested that Mr. Morga have his client execute and return the Application to Discharge Charge so that the mortgage currently registered against title to the Unsold Units can be discharged. Attached hereto as **Appendix P** is a copy of an e-mail string between Ms. Mitchell and Mr. Morga in respect to payment of the Letter of Credit Costs and the discharge of the Mortgage, including a copy of the Application to Discharge Charge provided by e-mail to Mr. Morga.
- 6.22 The executed Application to Discharge Charge has not been returned to counsel for the Receiver. The Receiver requests an Order discharging the Mortgage and directing the Land Registrar to expunge the Mortgage from title to the Real Property.
- 6.23 The Listing Agreement does not contain a provision granting security to Valente Real Estate for unpaid commissions and other amounts payable to Valente Real



Estate thereunder.

- 6.24 Portofino 2 is insolvent and the subject of the within receivership proceedings. The Receiver seeks the advice and direction of the Court as to whether maintaining the Letter of Credit in favour of Valente Real Estate would be contrary to public policy as it would have the effect of reordering priorities as among the unsecured and secured creditors of Portofino 2 in a manner not provided for at law. The Receiver is of the view that in the absence of the Letter of Credit secured by BMO's mortgage security, a judgment, if any, in respect of the Valente Real Estate's claim would be an unsecured claim in these receivership proceedings.
- 6.25 The Receiver takes the view that there is no prejudice to cancelling the Letter of Credit because the Receiver is in possession of the assets of Portofino 2 and there is no longer any concern about the dissipation of assets by Portofino's principals. On the contrary, there is prejudice to the other stakeholders of Portofino who may have claims in priority to or on equal footing with the otherwise unsecured claim of Valente Real Estate should the Letter of Credit be withdrawn, revoked, cancelled or set aside. Moreover, the effect of the Letter of Credit is to subordinate the mortgage security held by those secured creditors subordinate to BMO's mortgage security.

## 7. Statement of Receipts and Disbursements of the Receiver

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7.1 The Receiver maintains an account at BMO in London, Ontario. Attached as **Appendix Q** is the Statement of Receipts and Disbursements. Details of the Receiver's receipts and disbursements is as follows:

### 7.2 Receipts

- a) *Condominium rent collected (\$73,683.00)* — The Receiver collected \$73,683.00 from the rental of the Unsold Units.
- b) *Parking rent collected (\$645.00)* — The Receiver collected \$645.00 from the rental of parking spaces.

### 7.3 Disbursements

- a) *Condominium common fees (\$15,857.00)* — The Receiver paid \$15,857.00 to ECC 122 for November, 2013 common fees.
- b) *Legal fees – Sutts Strosberg (\$5,000.00)* – The Receiver paid \$5,000 to Sutts Strosberg LLP to provide a review and chronology of the Valente Court Action for the Receiver's counsel.
- c) *HST paid (\$650.00)* – The Receiver has paid \$650.00 on its disbursements.

## 8. Fees and Disbursements of the Receiver and Counsel to the Receiver

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- 8.1 Pursuant to Paragraph 19 of the Appointment Order, the Receiver and counsel to the Receiver shall be paid their reasonable Professional Fees in each case at their standard rates and charges and the Receiver and counsel to the Receiver have been granted a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person as security for payment of the Professional Fees (the "**Receiver's Charge**").
- 8.2 Pursuant to paragraph 21 of the Appointment Order, the Receiver is at liberty, from time to time, to apply reasonable amounts, out of the monies in its hands, against the Professional Fees, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its Professional Fees when and as approved by the Court.
- 8.3 Attached as **Appendix R** is the fee affidavit of Stephen N. Cherniak sworn December 5, 2013 containing BDO's interim account as Receiver for the period, July 19, 2013 to November 28, 2013.
- 8.4 The Receiver submits that the hourly rates charged by the Receiver and its staff are commensurate with commercially reasonable rates for mid-market insolvency firms in the Southwestern Ontario region.
- 8.5 Attached as **Appendix S** is the fee affidavit of Sherry A. Kettle, sworn December 6, 2013 containing the interim account of MT for the period September 9, 2013 to November 15, 2013.

8.6 It is the Receiver's opinion that the Professional Fees are fair and reasonable and justified in the circumstances and accurately reflect the work done by the Receiver and MT in connection with the receivership during the relevant periods. The Receiver recommends approval of the Professional Fees by the Court.

## 9. Recommendations

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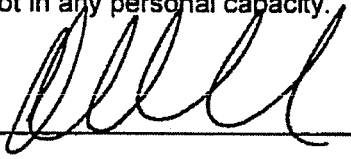
- 9.1. The Receiver recommends and respectfully requests:
- (a) the advice and direction of the Court with respect to issues relating to the Letter of Credit posted by BMO in the amount of \$2,000,000 in favour of Valente Real Estate as security for any judgment obtained by Valente Real Estate in the Valente Court Action, including:
    - (i) whether Valente Real Estate is contractually entitled to security for any judgment obtained in the Valente Court Action arising from the Defendant, Portofino's breach of the Exclusive Listing Agreement?
    - (ii) whether in the context of these receivership proceedings there remains any risk to Valente Real Estate that the property, assets and undertaking of Portofino will be dissipated or disposed of pending a trial of the remaining issues in the Valente Court Action?
    - (iii) whether maintaining the Letter of Credit in favour of Valente Real Estate as security for any judgment is contrary to public policy as it has the effect of reordering priorities among secured creditors of Portofino in a manner not provided for at law?
  - (b) in the event this Court orders that the Letter of Credit be cancelled, the advice and direction of the Court as to the Receiver's future involvement in the trial of the Valente Court Action and the defence of the Valente Court Action;
  - (c) in the event this Court orders that the Letter of Credit be cancelled, whether the Valente Court Action should be subject to the stay of proceedings created by the Appointment Order and whether the trial of the Valente Court Action, scheduled to take place in February, 2014, be adjourned until such time as the Court determines that funds remain after satisfaction of the secured claims to satisfy, in whole or in part, the claims of unsecured creditors;
  - (d) an Order, substantially in the form appended as Schedule "A" to the Notice of Motion:
    - (i) approving the First Report and activities and conduct of the Receiver described therein;
    - (ii) authorizing and directing the Receiver to enter into a property management agreement with Capaldi Holdings with respect to the

unsold units on terms to be negotiated between the Receiver and Capaldi Holdings;

- iii. authorizing and directing the Receiver to negotiate and enter into a payment arrangement with the City of Windsor with respect to the payment of property tax arrears;
- iv. approving the Receiver's proposed Sale Process and authorizing the Receiver to carry out the Sale Process;
- v. discharging the Mortgage and directing the Land Registrar to expunge the Mortgage from title to the Real Property;
- vi. directing Valente Real Estate to reimburse Portofino the Letter of Credit Costs;
- vii. approving the Statement of Receipts and Disbursements; and
- viii. approving the Professional Fees.

All of which is Respectfully Submitted this 6<sup>th</sup> day of December, 2013.

BDO Canada Limited in its capacity as Court Appointed Receiver of Portofino Corporation and not in any personal capacity.




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Per: Stephen N. Cherniak, CPA, CA, CIRP  
Senior Vice President

**TAB "A"**

54

Court File No. CV-13-19866

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE ) TUESDAY, THE 29th  
JUSTICE B. THOMAS ) DAY OF OCTOBER, 2013

**BANK OF MONTREAL**

Applicant

- and -

**PORTOFINO CORPORATION**

Respondent

**ORDER**

THIS APPLICATION made by the Applicant, Bank of Montreal, ("BMO") for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing BDO Canada Limited as receiver (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Portofino Corporation (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 245 Windsor Avenue, Windsor, Ontario.

ON READING the affidavit of Greg Fedoryn sworn September 6, 2013 and the Exhibits thereto and on hearing the submissions of counsel for BMO, Essex Condominium Corporation 122 ("ECC 122"), the Estate of Patrick D'Amore, Portofino Corporation and Dante Capaldi, Remo Valente Real Estate (1990) Limited and Sutts Strosberg LLP, no one appearing for Lombard General Insurance Company of Canada (now Northbridge General Insurance



Corporation) or Royal Bank of Canada, although duly served and on reading the consent of BDO Canada Limited to act as the Receiver,

### **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.

### **APPOINTMENT**

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, BDO Canada Limited is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

### **RECEIVER'S POWERS**

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary

course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor, and to complete any minor repairs or construction as may be required to release and/or reduce security held for the Debtor's obligations under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, as amended;

- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby

conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate; In marketing the Property, the Receiver will consult with ECC 122; however the advice and opinions of ECC 122 will not be binding upon the Receiver;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$200,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, [or section 31 of the Ontario *Mortgages Act*, as the case may be,] shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

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5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

#### **REPORT TO COURT AND STAKEHOLDERS**

7. THIS COURT ORDERS that the Receiver will deliver its first report to the Court on notice to BMO, Dante Capaldi, the Estate of Patrick D'Amore, Osvaldo Rizzo, Northbridge General Insurance Corporation, Remo Valente Real Estate (1990) Limited, Sutts Strosberg LLP;

Royal Bank of Canada, Essex Condominium Corporation no.122 and the City of Windsor (collectively, the "Stakeholders") within 45 days following its appointment.

8. THIS COURT ORDERS that the Receiver will report to the Stakeholders on a quarterly basis, prorated for 2013, such that the first such report is not required until the end of the first quarter of 2014.

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

9. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

#### **NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY**

10. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court. Leave of the Court is hereby granted to continue the Proceeding known as *Remo Valente Real Estate (1990) Limited v. Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc., Portofino Corporation and Dante Capaldi*, Court file 05-CV-5864CM.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

11. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (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 THE RECEIVER**

12. THIS COURT ORDERS that 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 Debtor, without written consent of the Receiver or leave of this Court.

**CONTINUATION OF SERVICES**

13. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor 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 Debtor 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 Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current 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 Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

**RECEIVER TO HOLD FUNDS**

14. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

**EMPLOYEES**

15. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

**PIPEDA**

16. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

**LIMITATION ON ENVIRONMENTAL LIABILITIES**

17. THIS COURT ORDERS that nothing herein contained shall require the Receiver 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 Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver'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.

#### **LIMITATION ON THE RECEIVER'S LIABILITY**

18. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

#### **RECEIVER'S ACCOUNTS**

19. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

20. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

21. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

#### **FUNDING OF THE RECEIVERSHIP**

22. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$250,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercisc of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

23. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

25. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

**GENERAL**

26. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
27. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.
28. 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 Receiver and its 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
29. THIS COURT ORDERS that the Receiver 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 Receiver 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.
30. THIS COURT ORDERS that the applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.
31. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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J. S. P. Pomeroy

ENTERED AT WINDSOR	
In Back No.	24
re Document No.	1485
on	NOV 21 2013
by	25

## SCHEDULE "A"

## RECEIVER CERTIFICATE

CERTIFICATE NO. \_\_\_\_\_

AMOUNT \$ \_\_\_\_\_

32. THIS IS TO CERTIFY that BDO Canada Limited, the receiver (the "Receiver") of the assets, undertakings and properties of Portofino Corporation (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (the "Court") dated the \_\_\_\_\_ of \_\_\_\_\_, 2013 (the "Order") made in an action having Court file number \_\_\_\_\_ has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ \_\_\_\_\_, being part of the total principal sum of \$ \_\_\_\_\_ which the Receiver is authorized to borrow under and pursuant to the Order.

33. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the day of each month] after the date hereof at a notional rate per annum equal to the rate of \_\_\_\_\_ per cent above the prime commercial lending rate of Bank of Montreal from time to time.

34. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

35. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

36. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

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37. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

38. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the \_\_\_\_ day of \_\_\_\_\_, 2013.

BDO Canada Limited, solely in its capacity  
as Receiver of the Property, and not in its  
personal capacity

Per: \_\_\_\_\_  
Name:  
Title:

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**Bank of Montreal**  
*Applicant*

**Portofino Corporation**  
*Respondent*

Court File No. CV-13-19866

ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
WINDSOR

ORDER

**ROBINS APPELBY & TAUB LLP**  
Barristers & Solicitors  
2600 - 120 Adelaide Street West  
Toronto ON M5H 1T1

**David A. Taub**  
LSUC No. 33518M  
Tel: (416) 360-3354  
Fax: (416) 868-0306

Lawyers for the Applicant, Bank of Montreal

**TAB "B"**



Portofino  
Rent roll - November 2013

Unit #	Rent	Detail
102	-	Vacant unit
103	\$ 1,600.00	
104	1,650.00	
105	1,575.00	
106	-	
203	1,500.00	
204	1,435.00	
304	1,600.00	
309	1,500.00	
401	-	New tenant as of Dec. 1, 2013
402	1,500.00	
408	1,650.00	
508	1,750.00	
601	1,500.00	
603	1,850.00	
701	1,600.00	
704	2,200.00	
708	1,850.00	
803	-	Vacating Nov. 30, 2013 - Last month rent applied
804	1,550.00	
805	1,800.00	
806	1,900.00	
901	2,200.00	
903	2,000.00	
904	2,000.00	
906	2,300.00	
1001	2,250.00	
1002	2,150.00	
1008	1,485.00	
1101	2,000.00	
1102	2,200.00	
1104	2,100.00	
1105	2,200.00	
1108	1,450.00	
1301	2,500.00	
1303	2,785.00	
1401	2,700.00	
1403	2,700.00	
1404	2,750.00	
1501	2,400.00	
1502	3,250.00	
1603	-	Occupied by property manager
1605	2,000.00	
Garage rental	400.00	
Parking rental	1,190.00	
	<u>\$ 77,020.00</u>	

**TAB “C”**

# Agreement to Lease Residential

TENANT (Lessee).....  
(Full legal names of all Tenants)

LANDLORD (Lessor).....  
(Full legal name of Landlord)

The Tenant hereby offers to lease from the Landlord the premises as described herein on the terms and subject to the conditions as set out in this Agreement.

- PREMISES:** Having inspected the premises and provided the present tenant vacates, I/we, the Tenant hereby offer to lease, premises known as:  
.....
- TERM OF LEASE:** The lease shall be for a term of .....commencing.....
- RENT:** The Tenant will pay to the said Landlord monthly and every month during the said term of the lease the sum of .....  
.....Canadian Dollars(CDN\$).....  
payable in advance on the first day of each and every month during the currency of the said term. First and last months' rent to be paid in advance upon completion or date of occupancy, whichever comes first.
- DEPOSIT AND PREPAID RENT:** The tenant delivers.....  
(herewith/upon acceptance) by negotiable cheque payable to.....  
.....  
in the amount of.....  
.....  
Canadian Dollars (CDN\$.....) as a deposit to be held in trust without interest as security for the faithful performance by the Tenant of all terms, covenants and conditions of the Agreement and to be applied by the Landlord against the.....  
and .....month's rent. If the Agreement is not accepted, the deposit is to be returned to the Tenant without interest or deduction.
- USE:** Premises to be used only for:

6. **SERVICES AND COSTS:** The cost of the following services applicable to the premises shall be paid as follows:

	LANDLORD	TENANT		LANDLORD	TENANT
Gas	<input type="checkbox"/>	<input type="checkbox"/>	Cable TV	<input type="checkbox"/>	<input type="checkbox"/>
Oil	<input type="checkbox"/>	<input type="checkbox"/>	Condominium/Cooperative fees	<input type="checkbox"/>	<input type="checkbox"/>
Electricity	<input type="checkbox"/>	<input type="checkbox"/>	Other:.....	<input type="checkbox"/>	<input type="checkbox"/>
Hot water heater rental	<input type="checkbox"/>	<input type="checkbox"/>	Other:.....	<input type="checkbox"/>	<input type="checkbox"/>
Water and Sewerage Charges	<input type="checkbox"/>	<input type="checkbox"/>	Other:.....	<input type="checkbox"/>	<input type="checkbox"/>

The Landlord will pay the property taxes, but if the Tenant is assessed as a Separate School Supporter, Tenant will pay to the Landlord a sum sufficient to cover the excess of the Separate School Tax over the Public School Tax, if any, for a full calendar year, said sum to be estimated on the tax rate for the current year, and to be payable in equal monthly installments in addition to the above mentioned rental, provided however, that the full amount shall become due and be payable on demand on the Tenant.

INITIALS OF TENANT(S):

INITIALS OF LANDLORD(S):

7. **PARKING:**

8. **ADDITIONAL TERMS:**

9. **SCHEDULES:** The schedules attached hereto shall form an integral part of this Agreement to Lease and consist of: Schedule(s).....

10. **IRREVOCABILITY:** This offer shall be irrevocable by..... (Landlord/Tenant) .....until.....p.m.on the..... day of....., 20.....after which time if not accepted, this Agreement shall be null and void and all monies paid thereon shall be returned to the Tenant without interest or deduction.

11. **NOTICES:** Landlord hereby appoints the Listing Broker as Agent for the purpose of giving and receiving notices pursuant to this agreement. **Only if the Co-operating Broker represents the interests of the Tenant in this transaction,** the Tenant hereby appoints the Co-operating Broker as Agent for the purpose of giving and receiving notices pursuant to this Agreement. Any notice relating hereto or provided for herein shall be in writing. This offer, any counter offer, notice of acceptance thereof, or any notice shall be deemed given and received, when hand delivered to the address for service provided in the Acknowledgement below, or where a facsimile number is provided herein, when transmitted electronically to that facsimile number.

FAX No.....(For delivery of notices to Landlord) FAX No.....(For delivery of notices to Tenant)

12. **EXECUTION OF LEASE:** Lease shall be drawn by the landlord pursuant to the Short Form of Leases Act, shall include the provisions as contained herein and in any attached schedule, and shall be executed by both parties before possession of the premises is given.

13. **ACCESS:** The Landlord shall have the right, at reasonable times to enter and show the demised premises to prospective tenants, purchasers or others. The Landlord or anyone on the Landlord's behalf shall also have the right, at reasonable times, to enter and inspect the demised premises.

14. **CONFLICT OR DISCREPANCY:** If there is any conflict or discrepancy between any provision added to this Agreement (including any Schedule attached hereto) and any provision in the standard pre-set portion hereof, the added provision shall supersede the standard pre-set provision to the extent of such conflict or discrepancy. This Agreement, including any Schedule attached hereto, shall constitute the entire Agreement between Landlord and Tenant. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein. This Agreement shall be read with all changes of gender or number required by the context.

15. **AGENCY:** It is understood that the brokers involved in the transaction represent the parties as set out in the Confirmation of Representation below.

16. **CONSUMER REPORTS:** The Tenant is hereby notified that a consumer report containing credit and/or personal information may be referred to in connection with this transaction.

INITIALS OF TENANT(S):

INITIALS OF LANDLORD(S):

17. **BINDING AGREEMENT:** This Agreement and acceptance thereof shall constitute a binding agreement by the parties to enter into the Lease of the Premises and to abide by the terms and conditions herein contained.

DATED at..... this..... day of....., 20.....

SIGNED, SEALED AND DELIVERED in the presence of: IN WITNESS whereof I have hereunto set my hand and seal.

(Witness)..... (Tenant or Authorized Representative)..... (Seal) DATE.....  
(Witness)..... (Tenant or Authorized Representative)..... (Seal) DATE.....  
(Witness)..... (Guarantor)..... (Seal) DATE.....

We/I the landlord hereby accept the above Offer, and agree that the commission together with applicable Goods and Services Tax (and any other tax as may hereafter be applicable) may be deducted from the deposit and further agree to pay any remaining balance of commission forthwith.

DATED at..... this..... day of....., 20.....

SIGNED, SEALED AND DELIVERED in the presence of: IN WITNESS whereof I have hereunto set my hand and seal:

(Witness)..... (Landlord or Authorized Representative)..... (Seal) DATE.....  
(Witness)..... (Landlord or Authorized Representative)..... (Seal) DATE.....

**CONFIRMATION OF EXECUTION:** Notwithstanding anything contained herein to the contrary, I confirm this Agreement with all changes both typed and written was finally executed by all parties at..... a.m. p.m. this..... day of....., 20.....

**CONFIRMATION OF REPRESENTATION**

Listing Broker..... Tel.No..... Represents.....  
Co-op/Tenant Broker..... Tel.No..... Represents.....

**ACKNOWLEDGEMENT**

I acknowledge receipt of my signed copy of this accepted Agreement to Lease and I authorize the Agent to forward a copy to my lawyer. I acknowledge receipt of my signed copy of this accepted Agreement to Lease and I authorize the Agent to forward a copy to my lawyer.  
(Landlord)..... DATE..... (Landlord)..... DATE.....  
(Landlord)..... DATE..... (Landlord)..... DATE.....  
Address for Service..... Tel.No..... Address for Service..... Tel.No.....  
Landlord's Lawyer..... Tenant's Lawyer.....  
Address..... Address.....  
Tel.No. FAX No. Tel.No. FAX No.

**FOR OFFICE USE ONLY** **COMMISSION TRUST AGREEMENT**  
To: Co-operating Broker shown on the foregoing Agreement to Lease:  
In consideration for the Co-operating Broker procuring the foregoing Agreement to Lease, I hereby declare that all moneys received or receivable by me in connection with the Transaction as contemplated in the MLS Rules and Regulations of my Real Estate Board shall be receivable and held in trust. This agreement shall constitute a Commission Trust Agreement as defined in the MLS Rules and shall be subject to and governed by the MLS Rules pertaining to Commission Trust.  
DATED as of the date and time of the acceptance of the foregoing Agreement to Lease. Acknowledged by:  
Signature of Listing Broker or authorized representative Signature of Co-operating Broker or authorized representative

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SCHEDULE "A"

- 1) THE TENANT HEREBY AGREES TO PERSONALLY GUARANTEE THE MONTHLY LEASE PAYMENTS THROUGHOUT THE DURATION OF THE TENANCY PERIOD. IT IS UNDERSTOOD BY THE TENANT AND THE LANDLORD THAT IF THE TENANT INTENDS ON SUB-LEASING THE PREMISES, SUBJECT TO LANDLORD APPROVAL, AND THEN SUB-LEASES THE PREMISES, SUBJECT TO LANDLORD APPROVAL, THE TENANT FURTHER PERSONALLY GUARANTEES THE MONTHLY PAYMENTS THROUGHOUT THE DURATION OF THE TENANCY PERIOD;
- 2) THE TENANT AND LANDLORD AGREE THAT AN ACCEPTED AGREEMENT TO LEASE SHALL FORM A COMPLETED LEASE AND NO OTHER LEASE WILL BE SIGNED BETWEEN THE PARTIES;
- 3) THE TENANT, IF NOT IN DEFAULT HEREUNDER, SHALL PROVIDE BY WRITTEN NOTICE TO THE LANDLORD AT LEAST 60 DAYS BEFORE THE END OF THE LEASE TERM, THEIR INTENTION TO RENEW OR NOT RENEW THE LEASE FOR A FURTHER YEAR TERM;
- 4) THE TENANT AGREES TO ABIDE BY AND COMPLY WITH THE CONDOMINIUM RULES AND BY-LAWS DURING THE TERM OF THE LEASE AND AGREES TO COMPLETE AN ACKNOWLEDGEMENT THEREFROM (IF APPLICABLE);
- 5) THE TENANT AGREES TO BE RESPONSIBLE FOR ANY DAMAGES CAUSED BY HIM OR HIS FAMILY AND FRIENDS TO THE PROPERTY AND APPLIANCES AND TO REPAIR OR REPLACE OR RESTORE THE DWELLING AT THE TENANT'S EXPENSE AND THE TENANT FURTHER AGREES TO MAINTAIN SAID APPLIANCES IN A STATE OF ORDINARY CLEANLINESS AND WORKING ORDER AT THE TENANT'S COST;
- 6) THE TENANT AGREES TO BE RESPONSIBLE FOR ANY COSTS FOR REPAIR OR REPLACEMENT DUE TO THE PRESENCE OF ANY PETS ON THE PREMISES. THE TENANT FURTHER AGREES THAT IF PETS ARE KEPT ON THE PREMISES, THE TENANT SHALL AT LEASE TERMINATION HAVE THE CARPETS PROFESSIONALLY CLEANED AND MAKE REPAIRS THAT MAY BE NECESSARY TO RESTORE THE PREMISES TO ITS ORIGINAL STATE IF THERE ARE ANY DAMAGES CAUSED BY PETS;
- 7) THE TENANT AGREES NOT TO MAKE ANY DECORATING CHANGES TO THE PREMISES WITHOUT THE EXPRESS WRITTEN CONSENT OF THE LANDLORD;
- 8) THE TENANT AGREES TO BE RESPONSIBLE FOR GRASS CUTTING, LAWN MAINTENANCE, AND SNOW REMOVAL IN THE DRIVEWAY AND THE MUNICIPAL SIDEWALKS (IF APPLICABLE);
- 9) THE TENANT ACKNOWLEDGES THE LANDLORD'S FIRE INSURANCE ON THE PREMISES PROVIDES NO COVERAGE ON THE TENANT'S PERSONAL PROPERTY;
- 10) THE TENANT AGREES TO PAY THE COST OF ALL UTILITIES REQUIRED ON THE PREMISES DURING THE TERM OF THE LEASE AND ANY EXTENSION THEREOF, INCLUDING BUT NOT LIMITED TO ELECTRICITY, GAS, AND HOT WATER TANK RENTAL;
- 11) TENANT FURTHER AGREES TO PROVIDE PROOF TO THE LANDLORD ON OR BEFORE THE DATE OF POSSESSION THAT THE SERVICES HAVE BEEN TRANSFERRED TO THE TENANT'S NAME;
- 12) THE TENANT SHALL PROVIDE THE LANDLORD WITH COPIES OF THREE FORMS OF IDENTIFICATION SUCH AS A DRIVER'S LICENCE, SOCIAL INSURANCE NUMBER, AND BIRTH CERTIFICATE OR PASSPORT;
- 13) THE TENANT ACKNOWLEDGES THAT THE PROPERTY IS FOR SALE AND AGREES TO ALLOW THE LANDLORD OR HIS AGENT TO SHOW THE PROPERTY AT ALL REASONABLE HOURS TO PROSPECTIVE PURCHASERS OR TENANTS AFTER GIVING THE TENANT AT LEAST TWENTY FOUR (24) HOURS WRITTEN NOTICE OF SUCH SHOWING AND TO ALLOW THE LANDLORD TO AFFIX A FOR SALE OR FOR RENT SIGN ON THE PROPERTY; AND
- 14) THE TENANT FURTHER ACKNOWLEDGES AND AGREES THAT IF THE PROPERTY IS SOLD WITHIN THE LEASE TERM THE LANDLORD SHALL PROVIDE WRITTEN NOTICE TO THE TENANT TO VACATE THE PREMISES AND THE TENANT SHALL VACATE THE PREMISES WITHIN 60 DAYS OF THE NOTICE TO VACATE.

CONDOMINIUM RULES

BYLAW #3 as amended are the following rules respecting the use of the common elements and units to promote the safety, security or welfare of the owners and residents, and to prevent unreasonable interference with the use and enjoyment of the common elements and of other units.

The following rules and regulations shall be observed by the owners and any other person occupying a unit with the owner's approval, and all guests and invitees of any one of them, whose acts and omissions in relation to the observance of these rules the owner shall be responsible for:

1. No one shall do or permit anything to be done in a unit or bring or keep anything therein which will in any way increase the risk of fire or the rate of fire insurance on any building or property kept therein, or obstruct or interfere with the rights of the other owners, or in any way injure or annoy them, or conflict with the laws relating to fire or with the regulations of the Fire Department or with any insurance policy carried by the Corporation or any owner or conflict with any of the rules and ordinances of the Board of Health or with any statute or municipal by-law.
2. Nothing shall be placed on the outside sills or projections. No awning or shade shall be erected over or outside of the windows or balconies without the prior written consent of the board of directors (hereinafter referred to as the "Board").
3. Water shall not be left running unless in actual use in any unit. Bathroom fixture and other plumbing apparatus, including drains, shall not be used for any purpose other than those for which they are constructed and no sweepings, garbage, rubbish, rags, ashes or other substances shall be thrown therein.
4. No one shall place, leave or permit to be placed, or left in, or upon the common elements including those of which there is exclusive use, any debris, refuse or garbage, except in the designated garbage chute or in any area designated by the Corporation as a central garbage depository. Such debris, refuse or garbage shall be contained in properly tied plastic bags not exceeding twenty-five (25 lbs) pounds per bag in weight, and not exceeding the dimensions of the garbage chute. Where such debris, refuse or garbage consists of packing cartons or crates, arrangements shall be made with the manager for the means of disposal thereof, and in no event shall such packing cartons or crates be left outside the unit.
5. No one shall create or permit the creation of or continuation of any noise or nuisance which, in the opinion of Board or the manager, may or does disturb the comfort or quiet enjoyment of the property by other owners, their tenants, licencees, families, guests, visitors, invitees, servants and persons having business with them.
6. Nothing shall be thrown out of the windows or doors of the building.
7. No one shall overload existing electrical circuits.
8. No auction sale shall be held on the property.
9. No stores of coal, or any combustible, inflammable or offensive goods, provisions or materials shall be kept in any unit except for use in any fireplace forming part of the unit.
10. The sidewalks, entryways, passageways, walkways and driveways used in common by shall not be obstructed by any one or used for any purpose other than for ingress and egress to and from units.
11. No mops, brooms, dusters, rugs or bedding shall be shaken or beaten from any window, door or those parts of the common elements over which there is exclusive use. No hanging or drying of clothes is allowed on any part of the common elements including those parts of the common elements over which there is exclusive use. Only seasonal furniture is allowed on balconies and the balconies shall not be used for storage.
12. No motor vehicle of any kind shall be driven on any part of the common elements other than on a driveway, parking space or loading space.
13. No television antenna, aerial, satellite dish, tower or similar structure and appurtenances thereto shall be erected on or fastened to any unit or to any portion of the common elements, except by the Corporation in connection with a common television cable system.
14. No one shall harm, mutilate, destroy, alter or litter any of the landscaping work on the property, including grass, trees, shrubs, hedges, flowers or flower beds.
15. No building or structure or tent shall be erected and no trailer either with or without living, sleeping or eating accommodations shall be placed, located, kept or maintained on the common elements by anyone other than the Declarant, as provided in the Declaration.
16. Without limiting or changing the other provisions in the Corporation's declaration and bylaws which proscribe unreasonable interference with the use and enjoyment of the common elements and of other units, neighbours shall suffer the normal annoyances that are not beyond the limit of tolerance they owe each other, considering the nature of a multi-unit condominium.
17. Roller blading through the lobby and corridors of the building may damage the limestone and the carpeting. Roller blades are to be put on and removed outside of the building.
18. Bicycles are to be stored in individual storage lockers or in the parking garage below. They are not allowed in residential units for the reasons set out in #17 above.
19. Walking barefoot through the building is not allowed.
20. Smoking is not permitted in any of the common areas of the building.
21. Alcohol is not to be consumed in public areas of the building, save and except the lounge when private parties are being held.
22. Elevators are not to be kept on hold without securing the approval of the property manager.
23. Individuals not personally known to you should not be admitted to the building by you.
24. No decorations, adornments, furniture, floor mats or any other such items shall be placed or permitted in any of the hallways which are common areas.
25. Owners and residents shall require guests to sign in at the front desk in the log-in sheet provided.
26. Owners and residents shall park in assigned parking places only and each vehicle which has been assigned a parking permit must display the permit affixed to the rear view mirror.

**TAB "D"**



**PORTOFINO CORPORATION**  
**MONTHLY COMMON FEE SUMMARY**  
**FOR 2013**

UNIT	COMMON FEES
101	375.36
102	383.67
103	234.38
104	222.37
105	193.73
106	209.99
203	193.73
204	209.99
304	234.38
309	210.18
401	209.99
402	193.73
408	209.99
508	209.99
601	209.99
603	222.37
701	209.99
704	234.38
708	209.99
803	222.37
804	234.38
805	234.38
806	222.37
901	291.83
903	293.50
904	293.50
906	291.83
1001	291.83
1002	283.34
1008	210.18
1101	291.83
1102	283.34
1104	293.50
1105	283.34
1108	210.18
1201	394.45
1202	434.54
1301	394.45
1302	434.54
1303	434.54
1401	394.45
1402	434.54
1403	434.54
1404	394.45
1501	394.45
1502	434.54
1503	434.54
1505	314.93
1601	394.45
1602	434.54
1603	434.54
1605	314.93

UNIT	COMMON FEES
A-1	86.00
A-2	86.00
GP-107	13.36
GP-108	13.36
GP-112	13.36
GP-113	13.36
P-116	3.36
P-117	3.36
P-118	3.36
P-119	3.36
P-120	3.36
P-121	3.36
P-122	3.36
P-123	3.36
P-124	3.36
P-125	3.36
P-126	3.36
P-127	3.36
P-128	3.36
P-129	3.36
P-130	3.36
P-131	3.36
P-132	3.36
P-133	3.36
P-134	3.36
P-135	3.36
P-136	3.36
P-137	3.36
P-138	3.36
P-139	3.36
P-140	3.36
P-141	3.36
P-142	3.36
P-143	3.36
P-144	3.36
P-145	3.36
P-146	3.36
P-147	3.36
P-148	3.36
P-149	3.36
<b>TOTAL</b>	<b>15,857.00</b>

**TAB "E"**

# P PORTOFINO CONDOMINIUMS



1225 Riverside Drive West  
Windsor, Ontario N9A 0A2

Sales Office: 519.256.1167  
Toll Free: 1.866.236.5934

[www.portofinocondo.ca](http://www.portofinocondo.ca)

*Lease Availability*

MODEL	SQ. FT.	VIEW	SUITE	PRICE	CONDO FEE
MIRAMAR	1062	NORTH	105 •	\$249,900.00	\$191.65
		NORTH	203 •	\$259,900.00	
		WEST	402	\$275,900.00	
MARSEILLES	1150	EAST	106 •	\$259,900.00	\$207.74
		EAST	204	\$279,900.00	
		WEST	401	\$319,900.00	
		EAST	408	\$289,900.00	
		EAST	508	\$294,900.00	
		WEST	601	\$294,900.00	
		WEST	701	\$299,900.00	
PALERMO	1151	EAST	708	\$304,900.00	\$207.92
		SOUTH	309	\$194,900.00	
		SOUTH	1008	\$199,900.00	
		SOUTH	1108	\$204,900.00	
CAPRI	1217	NORTH	104 •	\$304,900.00	\$219.98
		NORTH	603	\$309,900.00	
		NORTH	803	\$349,900.00	
		NORTH	806	\$324,900.00	
SAN REMO	1282	NORTH	304	\$329,900.00	\$231.86
		NORTH	103	\$349,900.00	
		NORTH	704	\$354,900.00	
		NORTH	804	\$324,900.00	
		NORTH	805	\$324,900.00	
VENICE	1547	NORTH	1002	\$389,900.00	\$280.29
		NORTH	1102	\$394,900.00	
		NORTH	1105	\$404,900.00	
GENOVA	1593	NORTH WEST	901	\$392,900.00	\$288.70
		NORTH EAST	906	\$404,900.00	
		NORTH WEST	1001	\$399,900.00	
		NORTH WEST	1101	\$404,900.00	
COSTA BRAVA	1602	NORTH	903	\$394,900.00	\$290.34
		NORTH	904	\$404,900.00	
		NORTH	1104	\$414,900.00	
TOULON	1718	SOUTH	1505	\$399,900.00	\$311.54
		SOUTH	1605	\$404,900.00	
MONTE CARLO 2 STOREY LOFT	2036	WEST	101	\$499,900.00	\$371.32
MONACO 2 STOREY LOFT	2081	NORTH WEST	102	\$589,900.00	\$379.55
BIARRITZ	2233	NORTH WEST	1201	\$594,900.00	\$390.21
		NORTH WEST	1301	\$599,900.00	
		NORTH WEST	1401	\$604,900.00	
		NORTH EAST	1404	\$614,900.00	
		NORTH WEST	1501	\$609,900.00	
		NORTH WEST	1202	\$629,900.00	
		NORTH WEST	1302	\$634,900.00	
TRIESTE	2450	NORTH EAST	1303	\$639,900.00	\$429.87
		NORTH EAST	1402	\$639,900.00	
		NORTH EAST	1403	\$644,900.00	
		NORTH WEST	1502	\$644,900.00	
		NORTH EAST	1503	\$649,900.00	
		NORTH WEST	1603	\$674,900.00	

**TAB "F"**

EXCLUSIVE LISTING AGREEMENT

AGREEMENT MADE THIS 22nd DAY OF NOVEMBER 2002

BETWEEN:

REMO VALENTE REAL ESTATE (1990) LIMITED, a Company duly incorporated under the laws of the Province of Ontario,

hereinafter called "VALENTE"  
OF THE FIRST PART

- and -

1318941 ONTARIO LIMITED

hereinafter called the "Builder"  
OF THE SECOND PART

WHEREAS the Builder is or will be building condominium apartments on the following properties:

1203 RIVERSIDE DRIVE WEST, LOT 1, PLAN 392 AND PART OF FARM LOT 73, 1ST CONCESSION, AND 1231 RIVERSIDE DRIVE WEST, CONCESSION 1, PT. LOT 73, IN THE CITY OF WINDSOR, COUNTY OF ESSEX

AND WHEREAS the Builder is retaining the services of Valente to sell each condominium unit constructed or to be constructed thereon;

AND WHEREAS Valente has agreed to represent the Builder for the sales of the units;

NOW THEREFORE WITNESSETH in consideration of these premises, the sum of TWO DOLLARS (\$2.00), the receipt and sufficiency of which is hereby acknowledged, and the mutual covenants hereinafter contained the parties agree as follows:

GRANT OF EXCLUSIVE AUTHORITY TO PROMOTE AND SELL

THE BUILDER HEREBY GRANTS VALENTE THE EXCLUSIVE AUTHORITY TO PROMOTE AND SELL the above listed condominium units constructed or to be constructed thereon or the lands if condominiums units are not built until DECEMBER 30, 2006 and unless terminated by written notice THIRTY (30) days prior to the expiration of said term, shall be renewed for a further period of one (1) year.

COMMISSION

The Builder agrees to pay to Valente a commission of Four PER CENT (4%) of the sale price if sold by sales representatives assigned to the project and FIVE PER CENT (5%) if sold by other "Valente" salespeople or other salespeople registered with outside real estate brokers, of each condominium unit or lands sold under an Agreement of Purchase and Sale entered into during the currency of this Agreement, plus any applicable Goods and Services Tax or other service taxes that may be in effect from time to time, which commission together with any applicable taxes shall be due and payable 50% of each commission 45 days from the day in which the necessary pre-sales have been achieved to satisfy the condition in the Project Financing commitment provided that said sales are unconditional and the remaining 50% payable upon the completion of each sale. Provided that if a sale occurs after said time that the minimum pre-sales have been attained then 50% of the commission shall become due and payable within 30 days of the offer becoming unconditional, and the remaining 50% payable upon the completion of each sale.

OBLIGATIONS OF VALENTE

During the currency of this Agreement and any renewal thereof, VALENTE AGREES:

AMENDMENT TO LISTING AGREEMENT

BETWEEN:

REMO VALENTE REAL ESTATE (1990) LIMITED

Hereinafter called the "Broker"

-and-

PORTOFINO RIVERSIDE TOWER INC.

Hereinafter called the "Owner"

WHEREAS by Listing Agreement dated the 22nd day of November, 2002, the Owner listed the property known and described as condominium units to be built at 1203 Riverside Drive West, being Lot 1, Plan 392 and part of farm Lot 73, 1st Concession; and 1231 Riverside Drive West, being Concession 1, part Lot 73, in the City of Windsor, County of Essex with the Broker for sale;

AND WHEREAS the Owner may consider a sale of the said property and/or project as a whole, or the sale of a portion thereof;

AND WHEREAS a sale of the said property and/or project as a whole or the sale of a portion thereof might be negotiated as a sale of the shares of the Owner by its Shareholders, rather than as a sale of the said property by the Owner;

NOW THEREFORE this Agreement witnesseth that in consideration of the past and future marketing efforts of the Broker with respect to sale of the said property and/or project;

1. The Owner agrees to pay to the Broker a commission of ~~5%~~ <sup>5.5%</sup> per cent (5.5%) of the sale price of the property or project or any interest therein during the currency of the aforesaid listing agreement, plus any applicable Goods and Services tax or other service taxes that may be in effect from time to time, which commission together with any applicable taxes shall be due and payable upon completion of any such sale.

2. The undersigned, being all of the Shareholders of the Owner, hereby agree that the Broker shall be paid a commission in the event of a sale of part or all of the shares in the Owner to any third party, at the same rate and on the same basis as if the Owner had sold the said property or project or any interest therein, each Shareholder being responsible for the portion of such commission attributable to such Shareholder's shares in the Owner being so sold.

DATED this 29 day of Aug, 2004.

PORTOFINO RIVERSIDE TOWER INC.

Per: [Signature]  
Diane J. Capaldi, President

Per: [Signature]  
(Remo Valente, Vice-President)

We have authority to bind the Corporation

1233911 ONTARIO LIMITED

Per: [Signature]  
Remo Valente, President

I have authority to bind the Corporation

1243494 ONTARIO LIMITED

Per: [Signature]  
Malvin Muroff, President

I have authority to bind the Corporation

CAPALDI INVESTMENT HOLDINGS INC.

Per: [Signature]  
Diane J. Capaldi, President

I have authority to bind the Corporation

REMO VALENTE REAL ESTATE (1990) LIMITED

Per: [Signature]  
Frank Earl Egan, Officer

I have authority to bind the Corporation

DATED this 17th day of August, 2004.

DATED this 17 day of August, 2004.

DATED this 29 day of Aug, 2004.

DATED this 17th day of August, 2004.

**TAB "G"**

AGREEMENT

FROM: ~~TO:~~ Portofino Riverside Tower Inc.  
TO: ~~FROM:~~ Remo Valente Real Estate (1990) Limited

Portofino (2005) Limited Partnership agrees to keep Portofino Riverside Tower Inc. fully protected, defended and indemnified against all amounts that Portofino Riverside Tower Inc. may be legally obligated to pay to Remo Valente Real Estate (1990) Limited, if any, in respect of real estate commissions payable pursuant to the Exclusive Agreement at issue.

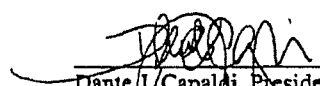
Portofino (2005) Limited Partnership further agrees to irrevocably direct its trustee, Portofino Corporation, to pay such amounts from the proceeds of the sale of the condominium units at issue in priority to any payment to Portofino (2005) Limited Partnership.

DATED at Windsor, Ontario this 17 day of January, 2006.

PORTOFINO (2005) LIMITED PARTNERSHIP

Per:

I CAPALDI GENERAL PARTNER CORPORATION


  
\_\_\_\_\_  
Dante J. Capaldi, President  
I have authority to bind the Corporation.

ACKNOWLEDGEMENT

PORTOFINO CORPORATION hereby acknowledges the foregoing irrevocable direction.

PORTOFINO CORPORATION

Per:

  
\_\_\_\_\_  
Dante J. Capaldi, President  
I have authority to bind the Corporation



**TAB “H”**

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COURT FILE NO.: 05-CV-005864CM

DATE: 20070831

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Remo Valente Real Estate (1990) Limited

Plaintiff

Gino Morga, Q.C., for the Plaintiff

- and -

Portofino Riverside Tower Inc., Westview  
Park Gardens (2004) Inc., Portofino  
Corporation and Dante Capaldi

Defendants

James K. Ball, for the Defendants

HEARD: May 7,9,10,11,14,15,16,17,18, 22,  
2007

REASONS FOR JUDGMENT

Brockenshire J.:

[1] This was an action seeking, directly or indirectly, payment of real estate commissions of \$510,000 plus interest thereon and future commissions, plus damages, and the setting aside of a conveyance of land under the *Business Corporation Act*, the *Fraudulent Conveyances Act* and contract law. At trial, a specific claim for relief under s. 248 of the *Business Corporations Act* was added.

[2] The pleadings, and the various documents filed at trial, contain the names of various corporations. However underlying, all of the corporate niceties was a very personal conflict between Dante Capaldi and Remo Valente.

**Background**

[3] Remo Valente came to Canada in 1955, attended technical school in Canada, went into the tool and die trade for a few years and then changed careers to real estate. He developed a

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large and successful real estate agency in the Windsor area, which by the time of trial he had transferred to his children, and became very involved in real estate development.

[4] Dante Capaldi is a first cousin of Remo Valente. They knew each other for all of their joint lives. Dante Capaldi had an extensive educational background, ending with a PhD in clinical chemistry, which he practiced at Henry Ford Hospital in Michigan and then worked for a pharmaceutical company. By virtue of his medically related doctorate, he is known as "Doctor" among his associates and in the community. In the 1990's, he changed his career path to real estate and particularly real estate development.

[5] At the time the Portofino project came along, both Valente and Capaldi had been involved in several real estate development projects, some of them together.

[6] Valente had located and "tied up" two properties, adjacent to each other, on Riverside Drive close to downtown Windsor, with an unobstructed view of the Detroit River and downtown Detroit, which hopefully could be the site of a large luxury condominium apartment building. A team of four persons was put together to carry the project forward - Valente, Capaldi, Frank Mancini, a chartered accountant who had been involved in like developments, and Melvin Muroff, a lawyer specializing in real estate and real estate development. The four, through personal corporations, incorporated Portofino Riverside Tower Inc. All four put in some cash, and Valente turned over the two properties to the new company at the price he had agreed to pay for them, but with an agreement that his real estate company would be the exclusive agent for the sale of all of the units in the proposed building.

[7] Despite the corporate trappings, the affairs of Portofino Riverside Tower Inc. (Portofino I) were run by the personal partnership of Valente, Capaldi, Mancini and Muroff. The four had clearly agreed to the exclusive listing arrangement for the proposed condominium units with Valente's real estate firm.

[8] Pursuant to that agreement, the plaintiff real estate firm arranged for two of its agents, Mr. and Mrs. Lunau, to work practically full time as a team out of a sales office on the site to sign up prospective purchasers. Per the Statement of Claim they obtained 75 conditional offers from prospective purchasers, for a building that was projected to have 120 units more or less. I was told that in order to get the necessary financing to actually put up the building, the lender had to have evidence of pre sales of at least half of the units.

[9] I was also told that the difficult issues of zoning, soil tests, engineering, and architectural design were all moving along well, when problems developed among the partners.

#### **The Shotgun Clause**

[10] It was common ground that there were differences of opinion between Capaldi and the other three partners, described as "bad blood" by Valente. Capaldi ceased attending meetings of the partners, sending his lawyer instead. The other partners concluded the venture could not continue like that. Valente and Mancini offered, apparently under a "shotgun clause" in the shareholders' agreement, to buy out Capaldi at a fixed price, with the option that Capaldi could

- 3 -

buy each of them out at the same price. To their surprise, Capaldi arranged the money and opted to buy out Valente and Mancini. He later bought out Muroff for the same amount, plus a bonus.

[11] The background of the "bad blood" is important, because it colours the later moves by Capaldi.

[12] Valente acknowledged that Capaldi had an unusual personality, and could be touchy. He felt the entire problem which caused the split up of the Portofino investors related to their agreement with each other re taking condos in the building. He explained that even before a sales office was opened, the partners met and felt it would be a good idea if each of the partners bought one of the high priced condo units, to get sales moving. The further idea was put forward that if an outside purchaser wanted to buy one of those units, the affected partner would step aside to allow the outside sale, and then be assigned another condominium. Valente said Capaldi did not like this idea, but then agreed, with the others, that the step aside process could only occur once with each partner. Then later, after the Lunaus started acting as the sales agents for Portofino, they brought in an offer for the unit designated as Capaldi's, and Valente accepted the offer, without consulting Capaldi. According to Valente, Capaldi was highly incensed about this, and said that he wasn't going to talk to the others anymore, and they should talk to his lawyer. The other three felt they could not carry on with a partner refusing to cooperate or speak to them, and initiated the buy/sell process.

[13] Frank Mancini's recall was that Capaldi blew up about "a number of things" but the split up between the investors came about over the particular issue of the sale of the condo unit that had been allocated to Capaldi. He could not understand this, as he felt Capaldi could have simply picked another unit. He did not recall whether any of the other investors had offered Capaldi their units. He acknowledged that Capaldi was very intelligent and was an astute business man but as he put it, he had his "quirks." From Mancini's point of view, Capaldi stopped talking to the others at about the time when construction was soon going to start, which would mean the four investors would have to be co-signatories as guarantors of a \$26.5 million dollar mortgage, and would have to come up with over \$3 million dollars in equity. He said he and Valente felt there was no choice but to try to buy out Capaldi.

[14] According to the evidence of Capaldi, there was much more to his decision to cease talking to the other investors than his upset over the sale of the condo allocated to him.

[15] He recalled a time in 2000 when he was acting as the project manager on a development in Amherstburg that also involved Valente and Muroff. There was a problem with getting the gas turned on to the project, which led Capaldi to advise buyers that their occupancy date would have to be delayed. He did not advise Valente or Muroff of this, which led, on his memory, to Muroff going "up and down my back" and saying that Capaldi was accountable for any costs arising from the delay. Capaldi was shocked by this, and shocked by Valente saying nothing other than they should have been advised. Capaldi declared that he was a sensitive man, and that he made it clear to them at that time, that he would never work again with that group.

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[16] Capaldi said he reconciled with Valente in 2002, after his mother (the sister of Valente's father) died, and agreed to participate actively with him in another project, which would include Valente's son Peter. On that project, Capaldi, on his own, bought a truck costing some \$32,000 for the project manager, and was criticized by Valente and Muroff over that. Further, he found Valente's son Peter was simultaneously working on another project with another developer called Fanelli, which Capaldi felt was a clear conflict of interest. He spoke up about that, and was criticized, and his conclusion was that he had received a clear message from Valente and Muroff that they had no confidence in his decision making. He felt he was being insulted.

[17] Despite these experiences, he became involved in the Portofino development. However, he felt the other three investors were meeting separate from him. Finally, at a meeting where all four were present, Valente announced that he had sold the condo allocated to Capaldi. He was shocked by this, and reminded of previous insults in years gone by. As he put it, "he packed his bags like a little boy and went home." Thereafter, Mr. Goldberg, his lawyer, attended in his place at the meetings of the partners.

[18] In his view, the three others ganged up on him in offers to buy him out. An offer was made to him at the face value of his investment and he was insulted by that. Then a few weeks later another offer was made by a Mr. Grossi, who he knew was a cousin of Mancini, which he also felt was insulting. So finally, when a buy/sell proposal was received from Valente and Mancini, instead of accepting their offer, he arranged financing assistance with other investors, and bought them out. He later, for the same price per share plus a bonus, bought out Muroff.

[19] There is no issue that, despite the witnesses all describing the transactions in that way, formally, the transactions appeared as purchases by a corporation owned by Capaldi of the shares in Portofino Riverside Tower Inc. from corporations owned by each of Valente, Mancini and Muroff. There is also no issue that the exclusive listing agreement in favour of Remo Valente Real Estate (1990) Limited with 1318941 Ontario Limited, which later changed its name to Portofino Riverside Tower Inc., dated November 22, 2002, and an amendment thereof dated August 17, 2004, predated the buyouts. The discussions between the individuals, and the formal documents among the various corporations did not purport to in any way amend or alter, and did not even mention, the exclusive listing agreement.

#### **The "Corporate Reorganization"**

[20] Capaldi became the sole shareholder of Portofino I around the 1<sup>st</sup> of January, 2005. He was well aware that this project had been dragging, the prospective purchasers who had paid initial deposits were asking questions, and it was becoming harder and harder to sign up new purchasers. The offers that had been signed to date called for an initial deposit of \$2,500. The offers contained an out clause for the developer, under which the deal could be cancelled if sufficient purchasers had not signed up, the project did not look to be financially viable etc. Capaldi sent out a letter to all of the persons who had made offers, formally waiving that condition in favour of the developer on January 11, 2005, and inviting all of the purchasers to a reception at which the construction timetable etc. would be explained. One result of that waiver

was that under their agreements of purchase of sale, each buyer was required to pay an additional \$17,500 deposit on the unit.

[21] Capaldi felt that the increase in the deposits being held in trust would improve his position re financing for construction. Another result, perhaps unforeseen, was that some of the prospective purchasers could not now be located, and a number of others were no longer interested in purchasing, and were not prepared to put up additional deposits. The Lunaus, who were still carrying on as the on site sales representatives, had the problem of having to try to save those sales, in which they were very successful.

[22] Mr. Capaldi's explanation of the corporate changes was that he had two purposes in mind. First, if construction was to get underway, he needed an owner/builder to be registered under the Ontario Home Warranty Program. Portofino Riverside Tower Inc. had been so registered, but its registration had been allowed to lapse. Mr. Capaldi explained to the court that correcting this would not simply be a matter of paying the annual fee which had been missed. The process of re-applying for registration would involve a delay of many months. Mr. Capaldi had available another corporation, Westview Park Gardens, which was duly registered.

[23] Also, Capaldi needed a vehicle which would be attractive to investors. He had received financial assistance from at least one other developer in Windsor for his purchase of the shares of Valente, Mancini and Muroff, and wanted a formal, permanent structure that would leave him in complete control. Both aims were accomplished by transferring the legal title to the lands from Portofino Riverside Tower Inc. to Westview Park Gardens (2004) Inc., and transferring the equitable title of Portofino Riverside Tower Inc. to the development and to the existing and future agreements for sale of the units in the building to a limited partnership, with Capaldi, through a corporation of his, being the general partner. Westview Park Gardens (2004) Inc. then changed its name to Portofino Corporation (Portofino II). A trust agreement was prepared between Portofino I and Westview, providing that it held the property in trust for Portofino I and would re convey on request and on being indemnified. All of this had the "incidental" effect of leaving Portofino I, the obligor under the listing agreement, as an empty shell.

### **The Change in Realtors**

[24] Mr. Gary Lunau testified as to what happened to him and his wife. They both worked for Valente Real Estate, and were the on site sales people for the project. In early 2002, they were invited to take on this project by Remo Valente, and attended planning meetings with the architect, etc., together with a large group of people. They were involved in setting up the sales office. They signed on with a special agreement with Valente Real Estate. It was clear that the offers they were to attract were to have a condition in favour of Portofino, but if a sufficient number of offers were signed, and the project went ahead, Portofino would withdraw that condition, and at that point the Lunaus were entitled to one-half of their accruing commissions. The balance would be payable to them when the project was completed and the deals were closed.

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[25] The sales office opened up and they started selling in June of 2003. Until December 2004 they reported to Remo Valente, who oversaw the details of the sales. They had very little contact with Capaldi until December of 2004. Mr. Lunau heard rumours of troubles among the developers in December of 2004, and then was advised that Capaldi had taken over the project. From then on he had regular structured meetings with Capaldi, but also continued reporting on sales to Valente because Valente Realty had the listing. He and his wife were aware that Capaldi had withdrawn the condition in favour of Portofino and in fact he was involved in setting up the reception for the purchasers. He, and more particularly his wife, were very aware that they had received nothing whatever for their sales efforts for the last year and a half to two years, and they were seeking payment of the half of the commissions they were supposed to receive when the conditions of the developer were withdrawn. Capaldi made promises that he would take care of them but said he was not about to pay Valente Real Estate anything at all. In January of 2005 he promised that an advance would be paid to the Lunaus. He made that promise several times, and then said that he could not pay them directly but he could set up \$50,000 as a loan at no interest. He paid that over and took a promissory note for it. Lunau and his wife felt that by the end of February they were entitled to something like \$200,000 and so they were not too happy. Capaldi again made it clear that he was not paying any commissions at all to Valente. Capaldi also made it clear to them that if Remo Valente, or his son Peter, or any other Valente agents came on to the property they were to be told to leave.

[26] Lunau and his wife had problems trying to collect the extra \$17,500 deposits from the buyers already signed up but eventually collected it from all but two people, who were both trades people that had put in offers because they had been told this was expected of the trades if they were going to work on the condominium. Capaldi undertook to attend to collecting from them.

[27] Capaldi, for no apparent reason, would fax Mr. Lunau telling him the sales office would be closed for a few days. The longest time was for nine days. When he went back in on April 26, Capaldi asked him to leave Valente Realty and go to Pedler Realty, another competing real estate firm in the city. He told Capaldi that that would be a violation of his contract with Valente and he could not do it. After that, the locks to the sales office were simply changed by Capaldi so that the Lunaus could not get in. Mr. Lunau said that Capaldi told him they would get their commissions when the deals closed and that Valente was getting a letter that his services were being ended.

[28] From the point of view of Mr. Lunau, Capaldi interfered with potential sales of units by closing the sales office, because not only did new purchasers go there, old ones would be stopping in and inquiring about progress. Capaldi took Portofino off the MLS listing system, which Mr. Lunau felt was a mistake since, on his calculations, some 70% of prospective buyers would check the MLS listing which was available free on the Internet.

[29] Also, Capaldi raised the price of all of the units by 10% in May of 2005, which would be a deterrent to new buyers.

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[30] The Lunaus had signed up themselves to buy two units in the building, one to live in and one to rent. They had anticipated paying for those units out of the commissions they would earn selling the others. They received formal notice that the promissory note for \$50,000 had been assigned to Capaldi Holdings, but expect Capaldi will live up to his word that that \$50,000 would only be payable when the full commissions were paid to the Lunaus. However, now that they are out of the project, they have lost the anticipated commissions on the sale of the 50 or so remaining condo units in Portofino, as well as their anticipated advantage in getting the listings from the various unit buyers to sell their previous residences.

[31] Capaldi's position was that his understanding was that commissions were only due when sales finally closed and he had no idea that removing the condition on all of the purchasers in January of 2005 would trigger an expectation of commissions from the Lunaus. He explained he wanted the MLS listing withdrawn because Portofino I was not now going to be the builder and his takeover of the project could cause confusion. Also, the listing, which had been placed by Valente, showed a lower price than what he proposed charging. He agreed that he had said something to Lunau about not paying anything to Valente but said that was in relation only to deals that were "going south" – which I took to mean, deals where the proposed buyers were not prepared to put up the additional deposit.

[32] Capaldi said he spoke to Mr. Lunau about going with another broker but that was when Lunau spoke to him about getting fed up with working with Valente, and also said that he was speaking to a third broker about possibly going with him.

[33] Capaldi was asked about whether he considered making another loan to the Lunaus. He said he loaned them \$50,000 when he heard that the Lunaus owed money to others and he wanted to help them out. He was thinking about making another advance to them but discussed it with his lawyer who told him they didn't seem to have any equity in anything, and then decided not to advance further money. However he offered to keep them working and recalled discussing with them having them work directly for the project.

[34] He agreed that he locked up the sales office in May and did not give any formal notice to Valente of termination until July.

[35] When asked why he had gone through the legal maneuvers he had with the project, Capaldi said that in his view Valente had breached his fiduciary duties and Capaldi's trust, and Capaldi did what he felt made legal and practical sense. He went on to add, with Valente sitting in the courtroom, that "if I never speak to him again, I'll die happy."

[36] Mr. Capaldi was extensively examined for discovery, and large portions of that discovery evidence was read in as part of the plaintiff's case. At questions 178 to 180 of the February 14, 2006 examination, it becomes clear that in the spring of 2005 a formal listing agreement was entered into between Portofino II and Bob Pedler Real Estate. At questions 27 through 34, it is clear that Capaldi understood the legal ownership of the land held by Portofino I was transferred to Westview Park Gardens (2004) Inc. to hold as a trustee, subject to a proviso that on request the legal title would be transferred back to Portofino I. Then the beneficial or equitable interest



of Portofino I, which would include the right to recall the legal title, was transferred from Portofino I to 1 Capaldi General Partner Corporation in exchange for a credit to its capital account in the limited partnership known as the Portofino 2005 Limited Partnership, in the amount of \$2,000,000. At questions 115 to 120 of the February 14, 2006 discovery we learned that Mr. D'Amore and Rizzo each put just under one-half of a million dollars into the project in December of 2004 and early 2005 but per questions 105 and 106 and the answers thereto, those advances were simply treated as unsecured loans.

[37] At questions 627 through 633 of the February 15, 2006 examination, it was clear that Capaldi attempted to get the Lunaus to work on the project through some other real estate company, although he knew that the exclusive listing agreement with Valente contained an agreement for the builder not to hire or retain directly or indirectly the services of the sales personnel of Valente. At questions 680 through 690, the termination of the Lunaus by Capaldi is confirmed as having been done by changing the locks in the sales office so that when Mr. Lunau went there he realized his key did not work. At questions 708 through 735, Capaldi expanded on the termination, advising he had explained the sales office was closed as he was restructuring, but at the same time, up to April 28, he was negotiating with them about a possible further advance or loan of \$50,000 and the possibility of them coming to work with him through another realtor. He then had a sub search done on the condominium where the Lunaus lived, found there was no equity in it, when the Lunaus represented there was equity to support and pay for their loan, and "realized that he was not the person to continue to represent the interest of Portofino." The transfers of the legal and equitable titles of Portofino I did not occur until May 5, so that it was still the owner when the Lunaus were effectively discharged.

#### **Mr. Goldberg**

[38] Mr. Jerry Goldberg, a lawyer since 1974 and a member of the Miller Canfield law firm, was called to testify by the defence. He was the personal legal advisor to Mr. Capaldi, whose legal work was done by Mr. Goldberg or through Mr. Goldberg by other members of the Miller Canfield firm. He confirmed that Capaldi would now be the directing mind of Portofino II, that Capaldi had bought out the other three investors in this project in late 2004 or very early 2005. In addition to Portofino, Capaldi had two other development projects underway at the time.

[39] He described in some detail the conveyancing and corporate moves in the "reorganization" of Portofino. The allegation was put to him that the transfer of the legal and equitable interest of Portofino I was designed to denude it of its value, and he gave the opinion that there was no change whatsoever in value because the book value of Portofino I of some \$2,000,000 was treated as the consideration for limited partnership units in the Portofino Partnership Corporation, controlled by Mr. Capaldi's corporation as the general partner.

[40] Mr. Goldberg was involved in ending the MLS listing for the Portofino condominiums. He said the reason for that was Mr. Capaldi had raised the prices of the units and the continuing listing on the MLS at a different price caused confusion.

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[41] In cross examination, Mr. Goldberg acknowledged that he knew there were problems between Capaldi and the other three investors, and that Capaldi did not want to jointly sign on to a mortgage with them, or go through the building construction with them, so that it became an issue of whether Capaldi would be bought out or the other three would be bought out.

[42] During the cross examination, it was pointed out that Mr. Goldberg had produced numerous documents but had not produced the entire file on the matter, and had not produced his own notes. Mr. Goldberg's position was that the unproduced items were protected by solicitor client privilege. The issue was argued, I ruled that in all of the circumstances, as he had taken the stand with the authority of his client, privilege could not be claimed for the notes he had made, and ordered the production of them. Mr. Goldberg returned to his office and brought back the notes that he could find. He explained that he found the notes loose in two separate files, he had put them together in the order he thought they had been in and made copies for the court and for counsel. This became Exhibit 18.

[43] He explained that the notes would be notes that he would be making when talking to Capaldi and that page 1 of the notes was likely made after Mr. Capaldi had acquired the shares of the other investors.

[44] What is, of course, very interesting, is that the notes of what were apparently initial discussions of the "restructuring," lists as the goal, "to get rid of commissions," apparently amended to say get rid of future commissions.

[45] At page 5, there is a further mention of commissions, among other things, and Mr. Goldberg commented that these were early notes of various possibilities if Capaldi bought out the others, and that Capaldi was not trying to avoid commissions on real estate totally. Capaldi knew that Valente had brought in offers and was owed commissions on them, and realized that if he hired Pedler he would owe commissions to him. However, at page 6, the notes sketched out the start of an idea that if Portofino transferred the land to a new owner, the listing agreement with Valente might no longer be binding.

[46] Running along with that was also, of course, the developing thought of using a limited partnership as a way of bringing in outside investors, with control being entirely in the hands of Capaldi.

[47] Mr. Goldberg confirmed that his letter of July 13, 2005, Tab 51 of the plaintiff's documents was a formal notice from him dated July 13, 2005 to the plaintiff, advising that the property had been transferred to Westview Park Gardens (2004) Inc., by way of an exchange, so that under the listing agreement no commission was payable, and that Westview had now listed the property with another realtor.

[48] Mr. Goldberg advised that he was not consulted about the \$50,000 advance made by Capaldi to Lunau and was surprised by it. He was also surprised by the unusual agreement with Valente under which the realtors were supposed to get a 50% advance on commission when the developer made the tentative offers firm.

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[49] The cross examination ended with Mr. Goldberg being asked whether, in advising Capaldi, he advised that the various corporate maneuvers and structures discussed might not work to advance Capaldi's goals, and Mr. Goldberg said Capaldi was advised of the process and the concerns in relation to every structure that he chose. He was asked if they discussed the one possibility that the process chosen might not get rid of the commissions and he confirmed that that possibility had been discussed.

#### **Discussion**

[50] As I indicated in the beginning, despite the complex corporate overlays, this case essentially involved a very unfortunate, and very personal dispute between Capaldi and Valente. Their relationship as first cousins, and the recognition of both as very successful business people in the community, makes the matter even more unfortunate.

[51] Over several days, I heard the evidence of Remo Valente, Gary Lunau, and Frank Mancini on behalf of the plaintiff, and of Jerry Goldberg and Dante Capaldi on behalf of the defence.

[52] Remo Valente is, of course, directly concerned about the outcome of this case. Nevertheless, I found his evidence to be clear, straightforward, reasonably well-detailed, and given in an unemotional and pragmatic way. In particular, he appeared to regard the problems between he, Mancini and Muroff with the fourth investor, Capaldi, in a very pragmatic and business-like way. While he was surprised at the turn of events on being bought out rather than buying out Capaldi, he nevertheless appeared to accept that the price paid fairly represented the interest of he and his fellow investors, and would free him to look to other opportunities, rather than having to worry over the successful completion of this project. Vigorous cross examination did not materially shake his testimony. I am prepared to accept his evidence as credible and reliable.

[53] Frank Mancini was independent of the personality clashes between Capaldi and Valente, and I am prepared to accept his relatively brief evidence as credible, unbiased, reliable and essentially supporting the evidence of Valente.

[54] Gary Lunau, while understandably upset with Capaldi, who is threatening the claims of he and his wife to commissions for years of work on this project, and has already ended the hoped for extra benefits of commissions on sales of further units, as well as of sales of unit buyers' existing homes, and who has commenced, as well, a personal action against him for return of a \$50,000 "loan" given in place of some \$200,000 in commissions he and his wife felt were due to them, nevertheless gave his evidence in a reasonably objective and unemotional way. What he had to say about signing up prospective purchasers, and keeping them signed up both through the great delays in this project and the call upon them for substantial increases in deposits, was supported by documents and the evidence of others. I accept his evidence as credible and reliable.

[55] Jerry Goldberg gave his evidence in a clear and detailed manner, while acknowledging from time to time that the passage of time may have dimmed his memory of some details. He

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clearly described the corporate and real estate moves that were undertaken by he and his firm, almost as an academic exercise, and was frankly surprised by the emotional overtones of what was happening. I have no difficulty at all in accepting what he told the court as being both credible and reliable.

[56] Capaldi testified at great length. He had difficulty in giving a simple answer to a simple question. It was clear that he had had many successes in his life, and that he was entitled to, and demanded respect. He clearly felt that Valente, and the other investors in Portofino I were not, according to him, giving him the respect he felt he was entitled to. His long and involved explanation of why it was necessary to transfer the project from Portofino I to another company that had home warranty registration, rather than simply renewing the previous registration of Portofino I, rang hollow to my ears in view of the other inevitable delays in getting actual construction underway. Although he spoke at some length about it, Capaldi did not make out a clear business reason for transferring out and locking up the legal title to Portofino I in a revocable trust, while transferring the equitable title to a limited partnership controlled by Capaldi, other than that suggested by the plaintiffs – to avoid the commission agreement.

[57] Capaldi was clearly upset and deeply affected by the slights he alleged to have suffered from the other investors, principally Valente, in the Portofino project and in previous projects. In my view, the deep hatred he had developed for Valente coloured both his perceptions of reality and his actions. While I accept as true and accurate his description of many things in the recent and distant past, and especially accept his description of the psychological effect upon him of what he perceived as insults to him by others, where there is a conflict between his evidence and the evidence of the other witnesses, my preference is for the evidence of the others.

[58] The Statement of Claim herein claimed specific relief under the *Business Corporations Act*, including an order reversing or setting aside the transfer of the title to the Portofino property back to Portofino I, immediate payment of \$510,000 plus interest at 2% per month, being estimated commissions that fell due when Portofino waived its cancellation right on pre-construction sale contracts on individual condos, and an order for the posting of security for commissions due and owing, and future commissions, in the amount of \$2.5 million. Separate from the *Business Corporations Act*, the \$510,000 was sought as damages, together with damages for breach of contract in the amount of \$5,000,000 plus interest and costs. At the opening of trial, the prayer for relief was amended to add to the “such further and other relief” clause, the proviso “including relief provided under s. 248 of the *Business Corporations Act*.”

[59] For convenience, I set out below the wording of s. 248 of the *Ontario Business Corporations Act*, R.S.O. c. B.16, s.248:

**248. (1)** A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71(33).

**Idem**

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

- (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
- (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
- (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248(2).

[60] Section 245 of the *Act* provides the definition of "complainant" as follows:

"Complainant" means,

- a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
- b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
- c) any other person who, in the discretion of the court, is a proper person to make an application under this part.

[61] The courts, in a number of cases, have emphasized the breadth and generality of the wording of the sections, and have provided many precedents for accepting a creditor as a complainant.

[62] In *Gignac, Sutts and Woodall Construction Co. v. Harris* [1997] O.J. No. 3084 Zalev J. at para. 62 of his decision, referenced a series of cases in which creditors were allowed to apply for an order under s. 248, and found, at para. 76 that although a solicitor's account was not a debt or liquidated demand, the law firm, as well as the builder, were entitled, under the "wider meaning" to be given to s. 248, to act as claimants there under.

[63] In *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* 40 O.R. (3d) 563 (C.A.) the court found in 1998 at p. 5 that "... it is no longer necessary to prove bad faith or want of probity to

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show a right to a remedy under s. 248:" and noted at page 4 that, "Courts' have made orders against directors personally, in oppression remedy cases" particularly in cases involving small, closely held corporations, where the director whose conduct was attacked had been the sole controlling owner of the corporation and its sole and directing mind.

[64] In *Downtown Eatery (1993) Ltd. v. Ontario* 54 O.R. (3d) 161 (Ont.C.A.) the court found at para. 56 that:

"Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the plaintiff. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow."

[65] At paragraph 58, the court adopted the often quoted words of McDonald J. in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) at p. 57 B.L.R.:

"More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The elements of the formula and the list of considerations as I have stated them should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case."

[66] An example of a case where a corporate officer was required to pay to a complaining debtor, part of the debt uncollectible from the corporation is *Prime Computer of Canada Ltd. v. Jeffrey* 6 O.R. (3d) 733, a decision in 1991 by G.B. Smith J. There, the corporate debtor became insolvent in March of 1989. The president, major shareholder and director of the corporation raised his pay from \$54,300 in 1988 to \$134,000 in 1989, with no business explanation therefore. The trial judge concluded that the president "had embarked upon a policy of stripping the company of its cash assets while it floundered." The president was ordered to pay direct to the sheriff, for the credit of the plaintiff, \$79,700 being the unwarranted increase in his salary.

[67] The position taken by the defence, in its closing statement, is that Portofino Riverside Tower Inc. (Portofino I) remains legally obligated to see the plaintiff paid its proper commissions as sales closed under agreements it procured. However, it never could have been in the position to pay 50% of commissions on withdrawal of its "out clause" because Portofino I, to the knowledge of all of the investors had only \$400 paid up capital, and Valente knew or should have known that commissions could not be paid from the first draw on the construction financing as that would breach the trust provisions of the *Construction Lien Act*. The "corporate reorganization" did not in any way breach the provisions of the listing agreement, and Portofino

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I continues to be legally obligated to pay the plaintiff its proper commissions as sales closed. However, the defence disputes any obligation to pay commissions on "supplier sales" (meaning sales to investors or to proposed trades people hoping that an investment in the project would assist them in getting contracts). The defence denies any obligation to pay damages as a result of Portofino II entering into a new listing agreement with a new realtor, and denies any obligation to pay damages for hoped for commissions on sales of unit purchasers existing homes. The defence argues that if damages are to be assessed, the assessment should be under the established rules in *Hadley v. Baxendale*.

[68] Mr. Morga's reply to the argument of Mr. Ball was brief. He said that this was not a contract case; it was not a case in which the remedy was limited by *Haldey v. Baxendale*. It was an equity case under s. 248 of the *O.B.C.A.*, seeking a fair remedy, not necessarily based on the strict interpretation of the listing agreement. The case was all about the expectations of the parties. Morga put it that Capaldi had the legal right to do what he did in the "reorganization" but not the equitable right.

[69] In his written argument, Mr. Ball put forth, at paragraph 4, several cogent business reasons for Capaldi to avoid the exclusive listing agreement. The problem with that is these were not reasons put forth by Capaldi. In Capaldi's evidence, and in the evidence of Lunau, it is clear that Capaldi, due to his personal animosity towards Valente, simply did not want any commissions money at all to go to Valente or his company. He did not want Valente, or any of Valente's other agents to be anywhere near the project, and turned aside an offer from Valente to buy any unit as if it was a trick or a sick joke. At trial he, with some obvious reluctance, stated the position that he was prepared to see commissions paid for sales made by the Lunaus, but only when they finally closed.

[70] Mr. Goldberg had suggested, as Mr. Ball did in his final argument, that after Capaldi had purchased the shares of the other investors, he could have simply sold Portofino's equity in the land, in its vacant unimproved state, to another corporation of his, at a relatively low price of say \$100,000, paid the 5% commission thereon per the amendment to the listing agreement which he had signed September 29, 2004, distributed the proceeds, wound up Portofino I, and be completely free of the listing agreement. Capaldi refused to do this. Valente, when asked, refused to release the listing agreement. That was the background, and, I conclude, the real reason for the very odd process of dividing the legal and equitable interest held by Portofino I, putting the legal interest in a bare trust, and exchanging the equitable interests for units in a limited partnership, with Capaldi's personal corporation as the general partner, so that those interests, including the power to reconstitute Portofino I, could not be reached by execution creditors without the aid of very special and unusual court orders.

[71] What to my mind speaks the loudest is point # 1 in Mr. Goldberg's notes of his discussions with Capaldi about restructuring, the goal was simply stated to be, "to get rid of commissions."

[72] Incidentally, I am not at all sure that Capaldi was being completely frank and open with Mr. Goldberg when discussing with him the advantages of a limited partnership. Mr. Goldberg

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was under the impression that this was being sought for its common business purpose as a vehicle through which investors could invest in a project without attracting personal liability. Mr. Goldberg knew there were two persons that had provided funds to assist in the buyout of the other three investors in Portofino I, and gathered that Capaldi might well be seeking others. However, there was no evidence whatever that Capaldi's two original investors, or anyone else, ever became limited partners in the limited partnership that was created.

[73] Much was made by Mr. Ball of the impracticality of the provision in the listing agreement for paying 50% of commissions once financing conditions were satisfied. However, the evidence of Capaldi was that he had been an investor with Valente, Muroff and Mancini in the Wildwood project, and the evidence of Mancini was that the same commission arrangement, of paying 50% of the commissions when the builder had sufficient prospective buyers to get financing, was used in that project. The evidence of Valente was that he picked up the idea from Geranium Homes, a very large builder, who had done some projects in Windsor and used that type of arrangement with its agents.

[74] I agree with the point raised by Mr. Ball, that the exclusive listing agreement clearly provides that 50% of each commission, plus taxes, shall be due and payable 45 days from the day "in (sic.) which the necessary pre-sales have been achieved to satisfy the condition in the project financing commitment." I accept that when Capaldi waived the right of the developer to back out of the sales, there was no formal project financing commitment in place. However, the evidence was that financing arrangements had been worked out in principle with the Bank of Montreal and had simply not been formalized. As I understand it, Capaldi waived the condition as a sign of good faith in the project, as an encouragement to existing and prospective buyers that in fact the project was going ahead, and incidentally as a means of triggering the obligation of prospective buyers to substantially increase their deposits. No doubt, with \$20,000 instead of \$2,500 on hand from each prospective buyer in a trust account, the needed financing would be easier to obtain. In any event, financing clearly did issue and the project in fact is substantially completed. Therefore, the argument would relate only to the date of commencement of prejudgment interest.

[75] I find on all of the evidence, including of course, the listing agreement signed by the four individual investors, together with the amendment thereto signed by the corporations of the four investors, that the plaintiff realtor, is a creditor of Portofino I and thus an appropriate complainant under s. 248 of the *Ontario Business Corporations Act*.

[76] I accept the evidence of Valente that when Capaldi bought out he, Mancini and Muroff, he reasonably expected that Capaldi would continue with the project of building and selling the units in Portofino Tower, and that the exclusive listing agreement would continue in full effect. I further accept his evidence that, on the other hand, he never expected that the property would be transferred so that he and the plaintiff realtor would be locked out of it. I conclude that these were reasonable expectations to hold in all of the circumstances, and that they were buttressed by the continuation of the Lunaus as the on-site realtors for months after the buyout, through the time of changeover and the time of meeting with and reassuring the prospective buyers and then further reassuring the buyers and collecting the substantial additional deposits required when



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Capaldi issued the developers waiver. The case law indicates that the expectations of the claimant form an important part of any claim for relief under s. 248, and I find the expectations of Valente were completely reasonable in the circumstances.

[77] The case law indicates that it is not necessary to prove bad faith or lack of probity to be entitled to relief under s. 248. However, I find here, principally on the oral and documentary evidence provided by Capaldi, that the "corporate restructuring" took place in the way it did primarily in an effort to "get rid of the commissions" which not only disregarded the interest of the plaintiff, but quite apparently was intended to block any efforts by the plaintiff to collect commissions due, and future commissions that should have come due under the exclusive listing agreement. In *Gestlon Transtech Inc. v. Shipment Systems Strategies Ltd.* [2001] O.J. No. 4710 C. Campbell J. said at para. 38:

In this case, at least one major purpose of the transfer of assets was to avoid exposure of those assets to judgment. In my view that is sufficient to attract oppression relief.

[78] In my own view, those words and the ensuing result apply equally here. I find that the plaintiff is entitled to an order under s. 248 against all of the named defendants.

[79] I find it is not necessary to deal with the equitable claim, because it would simply lead, through a more uncertain route, to the same claim for compensatory damages for the breach of the listing agreement.

[80] There was reluctant agreement at trial that the defendants owed commissions on the unit sales that were obtained by the Lunaus up to the time of their being locked out of the project, when and if each of those sales eventually closed.

[81] However, over and above that, there is a claim that half of those commissions were due and payable years ago, and there are also claims for commissions on sales of the balance of the units in the project, and for the loss of commissions on potential related sales by purchasers of units of their previously owned properties.

[82] It was clear from the beginning that the plaintiff's claim was essentially for three things:

1. Commissions payable and to become payable on the sale of the 75 or so units sold through the Lunaus before they were locked out of the premises and Capaldi unilaterally declared the exclusive listing agreement with the plaintiff was no longer in effect;
2. The future commissions expected to be earned on the sale of the remaining 50-odd units if the exclusive listing agreement had remained in effect; and
3. Ancillary commissions anticipated to have been earned, if the exclusive listing agreement had continued in effect, by the Lunaus being retained by at least

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some of the purchasers of units, to sell their existing homes on moving into Portofino.

[83] In the oral evidence before me, a repeated reference was made to commissions, but the references were in general terms, and then spoken of collectively, such as Mr. Lunau's evidence as to the amount due to he and his wife, where lump sum figures were given. The plaintiff's document brief includes at Tab 7 what purports to be a detailed list of the units sold as of March of 2005, showing individual sale prices, but not the total. This list demonstrates what is typical of this type of building – that the price of the same sized unit would be higher on higher floors than lower floors, and that the larger and presumably more luxurious units were on the upper floors with a price differential per floor greater than for the smaller units. I would suspect that detailed evidence may further indicate that some buyers may have received special deals for a variety of reasons, and if at the end of all construction work and registration of the condominium, there are some unsold units left, they may well be sold at lower prices. In short, there are a number of variables to consider.

[84] Tabs 21, 22 and 23 of the plaintiff's document brief are perhaps more helpful to me. They are monthly statements from the plaintiff to Portofino I for April, May and July of 2005, claiming half of the commissions due and payable to date plus interest. The May statement appears to add two units not reflected in the April statement, and should be indicative of the position as to actual sales through the plaintiff. The figure including GST is \$501,918.53.

[85] All three statements added interest, with a statement at the bottom that "interest is charged at the rate of 18% per annum compounded monthly on overdue accounts." The exclusive listing agreement and its amendment do not mention a rate of interest payable on overdue accounts.

[86] There is no indication that Capaldi ever disputed the calculation of commissions claimed due, or the claim for 18% interest when the accounts were not paid when due. I find he simply set out to "get rid of commissions," and later indicated he would pay commissions on sales made by the Lunaus, but only, despite the explicit provisions in the listing agreement he and the other investors had signed, upon final closing of those purchases.

[87] Mr. Morga, in his closing argument, referred to Tab 36 of the plaintiff's document brief, a list of all sales to January 25, 2005 with total commissions then standing at \$872,399.43, one-half of which would be \$436,199.87 plus GST of \$30,533.99, or totally \$466,733.86. Mr. Morga then approximated that four further units were sold, producing say \$50,000 more in commissions so that the commission figure would be around \$1,000,000. Looking at some rough projections of the total value of sales, which indicated some \$43,000,000, he suggested 4% of that or \$1,700,000 could be a helpful approximation.

[88] Mr. Ball did not deal with quantum at all in his argument.

[89] The issue of associated sales commissions was raised by Mr. Lunau in his evidence. It appears to me to make good common sense that the realtors that have been present at the project from its inception, and in effect holding the hands of the prospective buyers, would quite likely

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be asked to represent those buyers in sales of their own homes. However, no percentage figure of the number of such buyers was suggested, nor was there any suggestion as to the value of the homes they might own.

[90] I heard no evidence against the suggestion that if the Lunaus had continued with the project, they would have picked up sales from eventual buyers. I am, therefore, prepared to accept that liability has been made out under this heading. However the quantification of it is another matter. In *Webb & Knapp (Can.) Ltd. v. Edmonton (City)* [1970] S.C.R. 588, the court said that liability being established, it is up to the courts to make the best assessment it can to value the chance. I am prepared to make a finding on the basis of the slim evidence before me, of the number of such sales, bearing in mind that some condo purchasers may well not have a home to sell, and others, such as trades people, may be purchasing as an "investment" with no intention of giving up their existing homes.

[91] However, in my view, a fairly exact quantum of damages can be easily ascertained, if necessary, in a further proceeding. In this connection I am pleased to note that s. 248(3) of the *OBCA* authorizes the court to make "any interim or final order it thinks fit ...".

#### Conclusions

[92] I find that the plaintiff is properly entitled, as a creditor, to be a complainant under s. 248 of the *OBCA*.

[93] I find that the acts of defendants, Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc., and Portofino Corporation, under the direction of their operating mind, Dante Capaldi and particularly Dante Capaldi personally, have acted and carried on and conducted the affairs of the corporations in a manner that is oppressive or unfairly prejudicial to the valid interests of the plaintiff.

[94] I find, on the basis of the limited evidence before me the "chance" of the Lunaus or other agents of the plaintiff earning commissions on the sale of presently owned homes by the buyers of condo units in Portofino, frustrated by the action of the defendants, to be 20% - that is, that roughly one-quarter of purchasers who had homes to sell would have entrusted the sale to Valente agents, were it not for the actions of the defendants, but that figure should be reduced to account for buyers who do not have homes, who would continue their home ownership despite purchase of units, or who use Valente agents despite the actions of the defendants.

[95] I grant an immediate judgment, payable forthwith, in the amount of \$1,000,000 against all of the defendants jointly and severally, in favour of the plaintiff.

[96] I order that the defendants, jointly and severally, give security against all of their assets in the amount of \$2,000,000 to the plaintiff, as security for payment of further damages or loss to date for past, future and contingent commissions, accrued interest on unpaid accounts, prejudgment interest, costs and GST.

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[97] I direct that an accounting be held, on an urgent basis, before, if possible, either myself or Mr. Justice Gates, the managing judge of this action, and if not possible because of scheduling problems then before another Superior Court judge, to determine:

- a) the selling price of all condos sold to the date of the accounting;
- b) the commissions payable on those selling prices;
- c) the dates on which one-half of those commissions would have been payable under the listing agreement;
- d) the appropriate interest payable on commissions due and unpaid;
- e) the appropriate potential selling price of unsold condos;
- f) the appropriate date or dates of anticipated sales;
- g) the appropriate present value figures of potential commissions from such future sales;
- h) the reasonable average sale price of contingent ancillary sales by condo purchasers of their own homes;
- i) the reasonable average future date (if applicable) of such future sales and the present value, if applicable of commissions on such sales;
- j) the appropriate form and terms of the \$2,000,000 security, ordered hereunder;
- k) such further and other matters as may be necessary to complete the assessment of damages against the defendants herein.

[98] If the parties are unable to agree on costs, written submissions may be made to me.

  
John H. Brockenshire  
Justice

Released: August 31, 2007

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COURT FILE NO.: 05-CV-005864CM  
DATE: 20070831

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Remo Valente Real Estate (1990) Limited

Plaintiff

- and -

Portofino Riverside Tower Inc., Westview Park  
Gardens (2004) Inc., Portofino Corporation and  
Dante Capaldi

Defendants

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**REASONS FOR JUDGMENT**

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Brockenshire J.

Released: August 31, 2007

**TAB “I”**

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Court File #: 05-CV-5864CM

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MR. JUSTICE     )  
  )  
JOHN H. BROCKENSHIRE            )  
  )     TUESDAY, THE 9th DAY OF  
  )     OCTOBER, 2007

BETWEEN:

REMO VALENTE REAL ESTATE (1990) LIMITED

Plaintiff

- and -

PORTOFINO RIVERSIDE TOWER INC., WESTVIEW PARK  
GARDENS (2004) INC., PORTOFINO CORPORATION and DANTE J. CAPALDI

Defendants

**ORDER**

THIS MOTION made by the defendants was heard this day at the Court House, 245 Windsor Avenue, Windsor, Ontario.

ON READING the motion record filed on behalf of the defendants and on hearing submissions of counsel for all parties,

1. THIS COURT ORDERS AND DECLARES that Bank of Montreal Irrevocable Standby Letter of Credit No.: BMTO191410OS in the total amount of \$2,000,000.00 Canadian Dollars drawn in favour of the Accountant of the Superior Court of Justice of

Ontario ("Letter of Credit"), a copy of which is annexed as Schedule "A", is satisfactory security pursuant to paragraphs 2 and 3 of the Judgment granted herein on August 31, 2007.

2. THIS COURT ORDERS that, upon Portofino Corporation delivering the Letter of Credit, Writ of Execution 07-0002044 filed by the plaintiff in respect of the Judgment with the Sheriff of the County of Essex on September 14, 2007 ("Writ of Execution") shall be withdrawn.

3. THIS COURT ORDERS that Portofino Corporation shall register a Mortgage/Charge in favour of the plaintiff against title to the unsold units of Essex Standard Condominiums Plan No. 122 and its appurtenant interests, in the principal amount of \$1,000,000.00 and interest thereon at 6% per year commencing on the date of Judgment ("Mortgage"), which Mortgage is subject only to a first mortgage to Bank of Montreal and a second mortgage to Lombard General Insurance Company of Canada and shall be enforceable only after Judgment, final from any appeal, as further security for the amounts found due to the plaintiff in the Judgment and may be found due to the plaintiff in the trial of issues in paragraph 4 of the Judgment.

4. THIS COURT ORDERS that the plaintiff shall deliver partial discharges of the Mortgage to Miller, Canfield, Paddock and Stone LLP, solicitors for Portofino Corporation, on units ready to close to be used on such closings, subject to the payment of the net sale proceeds (after legal fees, G.S.T., and normal closing disbursements) to be applied as follows: (i) the payment of commissions due to the plaintiff by the terms of the offers,



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pursuant to paragraph 3(b) of the order of Justice Richard C. Gates dated June 29, 2007; (ii) payment to Miller, Canfield, Paddock and Stone LLP to be held in trust of the amount claimed by the plaintiff for further commission on upgrades, extras, parking units and storage units in accordance with paragraph 3(d) of the said order of Justice Richard C. Gates dated June 29, 2007; and (iii) the balance to be paid to Bank of Montreal in accordance with the agreement between Portofino Corporation and Bank of Montreal.

5. THIS COURT ORDERS that, upon delivery of the Letter of Credit and Mortgage, leave is hereby granted to Portofino Corporation to enter into agreements of purchase and sale and to close the sales of the remaining units.

6. THIS COURT ORDERS that the orders made in respect of the business and affairs of the defendants, including but not restricted to the orders of Justice Richard C. Gates dated December 22, 2005, December 15, 2006 and June 29, 2007, the Judgment and my order dated September 14, 2007, are amended or varied by the terms of this order and otherwise remain in full force and effect pending further order of this court.

JUSTICE JOHN H. BROCKENSHIRE

#532511/6

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Bank of Montreal

234 Simcoe Street 3rd Floor  
Toronto ON M5T 1T4  
Tel: 416 598-6112  
Fax: 416 598-6076  
SWIFT: BOMFCAT2  
Telex: MCI 62860

# SCHEDULE "A"

**Irrevocable**  
**Standby Letter of Credit No.: BMT01914100S**  
**Your Reference: 05-CV-5864 CM**

Date of Issue: October 3, 2007

**Beneficiary:**  
Accountant of the Superior Court of Justice of Ontario  
595 Bay St., 8th Floor  
Suite 800  
Toronto, Ontario M5G 2M6

**Applicant:**  
Portofino Corporation  
697 Front Road North  
Amherstburg, Ontario N9V 2V8

Amount: Two Million and 00/100's Canadian Dollars (CAD2,000,000.00)

Pursuant to the request of Portofino Corporation (hereinafter called the "Customer") we, Bank of Montreal, Global Trade Services, 234 Simcoe Street, 3rd Floor, Toronto, Ontario M5T 1T4, hereby establish and give to you an Irrevocable Standby Letter of Credit in your favour in the total amount of Two Million and 00/100's Canadian Dollars (CAD2,000,000.00) which may be drawn on by you at any time, from time to time, upon written demand for payment made upon us by you, which demand we shall honour without enquiring whether you have a right as between yourself and our said Customer to make such demand, and without recognizing any claim of our said Customer, or objection by it to payment by us.

Your drawing by sight Draft must bear reference to this Standby Letter of Credit number BMT01914100S dated October 3, 2007 and must be accompanied by a certified copy of an order, or judgement, or report of the Superior Court of Justice of Ontario, final from any appeal, directing that an amount up to Two Million and 00/100's Canadian Dollars (CAD2,000,000.00) be paid.

This Standby Letter of Credit has been established for delivery to the Superior Court of Justice of Ontario as security for the payment to the plaintiff of any such order, or judgement, or report of the Superior Court of Justice of Ontario entered in that certain action pending at Windsor under court file

**ORIGINAL**

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No.05-CV-5864 CM between Remo Valente, plaintiff and Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc., Portofino Corporation and Dante J. Capaldi, defendants.

Partial drawings are permitted under this Standby Letter of Credit.

This Standby Letter of Credit expires on October 2, 2008 subject to the following:

This Standby Letter of Credit shall be deemed to be automatically extended without any formal amendment for successive one year periods from the present or any future expiration date, unless at least thirty (30) days prior to any such date we shall notify you in writing, by registered mail or courier, that we elect not to extend this Standby Letter of Credit for any further period and at the same time forward to you together with such written notice of election a bank draft in the amount of CAD2,000,000.00 less any amount drawn under this Standby Letter of Credit, payable to the Accountant of the Superior Court of Justice of Ontario.

This Standby Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision, International Chamber of Commerce, Paris, France, Publication No. 600).

Bank of Montreal


*Margaret Chen*  
\_\_\_\_\_  
Signing Officer  
BMT01914100S

*E. Clarke*  
\_\_\_\_\_  
Authorized Signing Officer  
ELAINE CLARKE

MARGARET CHEN

ORIGINAL

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**BMO**  **Bank of Montreal**  
 234 Simcoe Street 3rd Floor  
 Toronto ON M5T 1T4  
 Tel: 416 598-6112  
 Fax: 416 598-6076  
 SWIFT: BOFMCAT2  
 Telex: MCI 62960

**Irrevocable  
 Standby Letter of Credit  
 No. BMT01914100S**

Amendment no. 1  
 Dated October 05, 2007

**Beneficiary:**  
 ACCOUNTANT OF THE SUPERIOR COURT  
 OF JUSTICE OF ONTARIO  
 595 BAY STREET, 8TH FLOOR, SUITE 800  
 TORONTO, ON M5G 2M6, Canada  
 Ref: 05-CV-5864 CM

**Applicant:**  
 PORTOFINO CORPORATION  
 697 FRONT ROAD NORTH  
 AMHERSTBURG, ON N9V 2V6  
 Canada

We amend our Standby Letter of Credit subject to the following terms and conditions. This amendment forms an integral part of the original instrument. All other terms and conditions remain unchanged.

**Amended Terms:**

Paragraph 3 is deleted and replaced with:  
 "This Standby Letter of Credit has been established for delivery to the Superior Court of Justice of Ontario as security for the payment to the plaintiff of any such order, or judgement, or report of the Superior Court of Justice of Ontario entered in that certain action pending at Windsor under court file No.05-CV-5864 CM between Remo Valente Real Estate (1990) Limited, plaintiff and Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc., Portofino Corporation and Dante J. Capaldi, defendants."

Unless otherwise instructed herein, all correspondence and enquiries regarding this transaction should be directed to our Customer Service Centre at the above address, telephone: 416-598-6112. Please indicate our reference number in all your correspondence or telephone enquiries.

Regards,

**ORIGINAL**  
*Margaret Chen*

MARGARET CHEN

*George Adekunle*

ADEKUNLE GEORGE Page 1 of 2