

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

BETWEEN:

CENTRAL 1 CREDIT UNION

Applicant

- and -

UM FINANCIAL INC. and UM CAPITAL INC.

Respondents

AFFIDAVIT OF MUFTI YUSUF PANCHBAYA

I, MUFTI PANCHBAYA, of the City of Mississauga MAKE OATH AND SAY:

1. I am the Chairman of Multicultural Consultancy Canada Inc., an independent *Shari'a* advisory board to UM Financial Inc., one of the respondents in this application and, therefore, have personal knowledge of the matters hereinafter deposed.
2. All my information, knowledge, and belief in this affidavit arises from the documents attached hereto as exhibits, unless expressly stated otherwise.

(a) Principal Issue: Leave to Intervene in Receivership Application

3. UM Financial Inc. (hereinafter "UM Financial") is currently engaged in litigation with Central 1 Credit Union (hereinafter the "Credit Union"), in which the former is resisting a receivership application commenced by the latter. As head of the *Shari'a* advisory board, I am seeking leave to intervene in the receivership application (either with or without another member of the board).

(b) Background to Islamic Finance: the Old Testament and the Holy Quran

4. The ethical principles behind *Shari'a*-compliant finance, more commonly known as Islamic finance, have a long tradition and lineage. In the Old Testament, *Ezekiel* 18: 8-9 states, "He that hath not given forth upon usury, neither hath taken any increase, that hath withdrawn his hand from iniquity, hath executed true judgment between man and man, hath walked in my statutes, and hath kept my judgments, to deal truly; he is just. He shall surely live, said the Lord God."

5. Furthermore, *Psalms* 15: 1, 2, 5 states, “Lord, who shall abide in thy tabernacle? Who shall dwell in thy holy hill? He that walketh uprightly, and worketh righteousness and speaketh the truth in his heart...He that putteth not out of his money to usury, nor taketh reward against the innocent.” *Exodus* 22: 25 states, “If thou lend money to any of my people, even to the poor with thee, thou shalt not be to him as a creditor; neither shall ye lay upon usury.” Finally, *Leviticus* 25: 35-37 states, “And if thy brother be waxen poor, and his means fail with thee, then thou shalt uphold him: as a stranger and a settler shall he live with thee. Take thou no usury of him or increase; but fear thy God; that thy brother may live with thee. Thou shalt not give him thy money upon usury, nor give him thy victuals for increase.”
6. The Holy Quran, in a chapter called the Heifer (that is largely about the story of Moses and the exodus of the Children of Israel from Egypt), states, “Those who devour usury will not stand except as stands one whom the Devil, by his touch hath driven from madness. That is because they say, ‘Trade is like usury.’ But God hath permitted trade and forbidden usury.” Attached hereto and marked as Exhibit “A” to this my Affidavit is an excerpt of a book entitled *Shari’a-Compliant Private Equity* containing the above-noted passages.

(c) The Role of the Advisory Board: Impartial and Independent

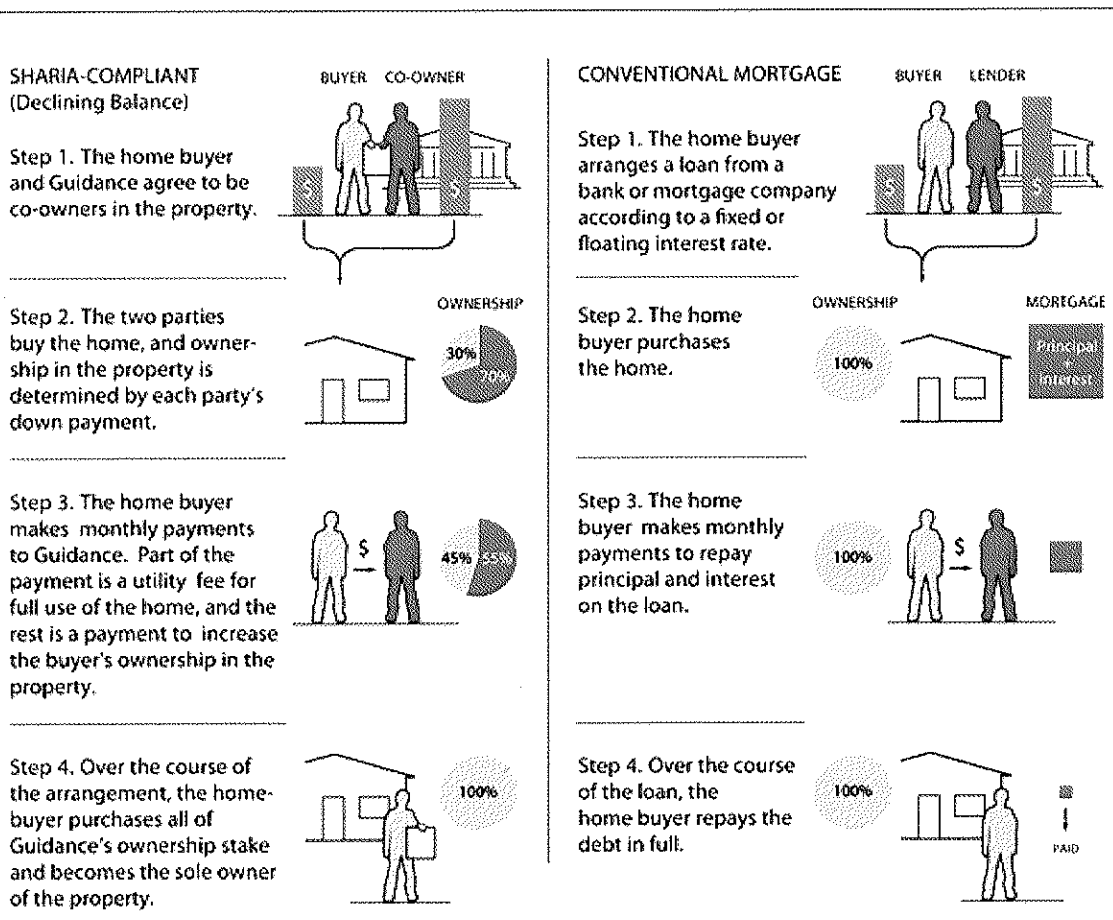
7. The role of a *Shari’a* advisory board in Islamic financial transactions is becoming increasingly written about and well-known. While a *Shari’a* advisory board is involved with a financial firm it is advising, it is supposed to remain both impartial and independent of the firm. In addition, as Hussain Hamid Hassan, a prominent scholar, stated in a recent interview on the role of the *Shari’a* board, “It is a principle of Sharia that a scholar is not allowed to conceal knowledge; rather, he has to bestow it upon whoever wants it...” Attached and marked as Exhibit “B” to this my affidavit is a true copy of the article discussing the role of a *Shari’a* advisory board to a firm like UM Financial.
8. I have been a *Shari’a* advisor to UM Financial since issuing rulings regarding its products in January 2005. Given the religious injunctions listed above, UM Financial has endeavoured to provide a range of Islamic finance solutions to the Canadian Muslim community, primarily in the Greater Toronto area. UM Financial has been involved in innovative ideas, such as providing RRSP-eligible real estate funds, interest-free student loans and a *Shari’a*-compliant Mastercard product. Attached and marked as Exhibit “C” to this my affidavit is a Corporate Fact Sheet, along with relevant

articles, on UM Financial. One of the articles, from *Muslim Link*, indicates the seriousness with which members of the Muslim community are treating the issue of usury (known in Arabic as *riba*).

- The core business of UM Financial is home financing, primarily funded through its facility with the Credit Union. Islamic finance companies have endeavoured to provide home financing solutions to Muslims throughout North America and UM Financial has followed the pioneering precedent of Guidance Financial in the U.S.A. Both UM Financial and Guidance financing base their home financing solution on the diminishing *musharakah* model, which is designed on trade principles:

The Guidance Difference

A comparison of the musharaka, or Declining Balance Co-ownership Program*, to a conventional mortgage:



Attached hereto and marked as Exhibit "D" to this my Affidavit is a true copy of a print-out from the Guidance Financial website on how their mortgage finance works and the above scan is a true image of the page thereof

(d) Continuing Support of Credit Union Necessary

10. UM Financial requires the continuing support of the Credit Union in order to provide home financing solutions to the Toronto Muslim community. Research by Ryerson University has shown that, despite great numbers and affluence, the Canadian Muslim community has very low rates of home ownership. The research found that, based on 2001 Census Bureau statistics, Muslims had the lowest rates of home ownership in comparison with other religious communities and that this stayed constant with analysis of previous census data from 1991-1995 and 1981-1990.

religion group	tenure		Total
	owned -	w rented -	
catholic	43.04	56.96	100.00
protestant	43.51	56.49	100.00
christian orthodox	28.94	71.06	100.00
christian not identif	34.16	65.84	100.00
muslim	27.97	72.03	100.00
jewish	57.45	42.55	100.00
buddhist	59.76	40.24	100.00
hindu	34.21	65.79	100.00
sikh	65.09	34.91	100.00
eastern religions	45.45	54.55	100.00
all other religions	38.46	61.54	100.00
no religious affiliat	48.18	51.82	100.00
Total	40.33	59.67	100.00

Attached hereto and marked as Exhibit “E” to this my Affidavit is a true copy of a Ryerson University study entitled “Home Ownership and Religious Affiliation: do homeownership rates vary by religion in Canada” and the above scan is a true image of a page thereof

11. On December 24, 2006, Jens Lohmueller, the commercial lending and product development manager of the Credit Union, accepted an award from UM Financial at the annual Reviving the Islamic Spirit (RIS) conference, which is attended by thousands of members of the Muslim community. The communication director, Shaikh Habeeb Alli, spoke on behalf of the *Shari'a* advisory board and I was also present. Attached hereto and marked as Exhibit “F” to this my Affidavit is a true copy of an email exchange between CEO of UM Financial, Omar Kalair, and a Credit Union communications specialist, Yee-Guan Wong, regarding coverage from the RIS event.
12. The partnership between UM Financial and the Credit Union was covered by the *Toronto Star* in its “Build the Business Challenge,” wherein Omar Kalair, was profiled along with nine other Toronto-area entrepreneurs. In an article entitled “Putting faith in mortgages,” the *Toronto Star* profiled the

relationship between Jens Lohmueller and Omar Kalair, showing how central the Credit Union was to UM Financial's residential mortgage pipeline. Attached hereto and marked as Exhibit "G" to this my Affidavit is a true copy of the *Toronto Star* article dated January 29, 2007.

13. UM Financial's relationship with the Credit Union has also received positive international press. In the *Global Islamic Finance Report (GIFR) 2010*, by BMB Islamic, it stated:

on a rent-to-own model. Over the years, a few more co-operatives have come to the market. UM Financial an Islamic financial institution was incorporated in 2004 and to date has partnered with five Canadian financial institutions in structuring and distributing pioneering Islamic retail financial products such as bank accounts, term deposits, investments, credit cards and mortgages to Canada's 1 million-strong Muslim community. Recently, UM presented Central 1 Credit Union a milestone award for its close to US\$ 100 million funding to UM, which has yielded a US\$ 10 million profit for Central 1 over the last four years. Islamic financial products are similar to halal food products, kosher food products or organic products in that all have a certification board and higher costs due to the absence of economies of scale. The goal of the Canadian Islamic financial industry is to bring products on par in pricing to the retail market, as is being done in the US and the UK.

Attached hereto and marked as Exhibit "H" to this my Affidavit is a true copy of chapter 27 the GIFR 2010 and the above scan is a true image of a portion thereof

(e) Other Alternatives: Conventional Financing, Ijara Loans, Housing Cooperatives

14. Without UM Financial, there are no Canadian-based mortgage solutions for Muslims looking for immediate financing.
15. I am aware of one company called Ijara Loans operates out of the U.S.A. and has a processing office in Ottawa. Ijara Loans has developed a trust structure whereby the company sets up a trust for the home owner, who is beneficiary of the trust. The trust pays interest to a conventional lender. Once the mortgage is paid off, the trust transfers title to the beneficiary. As such, Ijara Loans holds that the trust structure insulates home owners from paying interest. There are no provisions for relief in case of financial distress. While I am not a *Shari'a* advisor to Ijara Loans, I am aware of community concerns about the *Shari'a* compliance of their structure. Attached hereto and marked as Exhibit "I" to this my Affidavit is a true copy of an introduction letter to the Ijara Loans trust structure.

16. I am also aware of several Islamic housing cooperatives in Canada. However, in order to qualify for a mortgage through these cooperatives, you need to be a member/investor and your selection for home financing is based on a lottery system. As such, there is no assurance of home financing for several years. While the cooperative model continues to provide one means of Islamic home financing, it limits the opportunities for Muslims who desire financing on an immediate basis and who meet the economic criteria generally required by conventional lenders.
17. There have also been religious rulings (known as *fatawa*) on the permissibility of obtaining conventional interest-based financing where there are no alternatives. In my view, this issue has been decisively answered by Canadian scholars like Shaikh Faraz Rabbani and English scholars like Muhammad ibn Adam al-Kawthari who have quoted a Syrian scholar in stating, “The necessity which allows usurious loans is the same necessity which allows eating the meat of a dead animal, pig and the like, in which case the one necessitated is exposed to perish from hunger, nakedness or losing lodging. Such is the necessity, which makes prohibitions lawful.” Attached hereto and marked as Exhibit “J” to this my Affidavit is a true copy of a ruling by Imam Muhammad ibn Adam al-Kawthari published July 3, 2005.
18. That being said, the scholars have allowed the use of financing from banking institutions as long as it is structured in an Islamic fashion and there is no other source of viable funding. Attached hereto and marked as Exhibit “K” to this my Affidavit is a true copy of a question and answer session between Islamic educator Atif Khan and prominent scholars regarding interest, mortgages and proper Islamic structuring in a 2006 issue of *Islamica* magazine.
19. Although UM Financial launched an RRSP-eligible fund for residential mortgage financing, it is not a viable source of ongoing funding to meet the demand for Islamic mortgages. As such, without a replacement lender, the Credit Union remains the only viable source of funding for this important community-based product.

(f) Pressing Concern: From *Shari'a* Compliance to Potential Class Action

20. The *Shari'a* advisory board has communicated some of its concerns about the receivership application to the Credit Union but has not had an occasion to do so in open court.

21. While Omar Kalair has attempted to communicate our concerns to the court through his affidavit evidence, he is not a *Shari'a* expert.
22. By email correspondence dated May 27, 2011, Shaikh Habeeb Alli, wrote a letter to the Credit Union outlining the concerns of the Board. One of the concerns mentioned in this letter was the detrimental impact a receivership application would have on the *Shari'a* compliance of the community-based UM Financial product. Attached and marked as Exhibit "L" to this my affidavit is a true copy of Habeeb Alli's letter to the Credit Union.
23. By email correspondence dated June 13, 2011, I wrote a letter to the Credit Union and UM Financial stating that the court had to be advised of the serious consequences to the 181 families who are clients of UM Financial if the Credit Union pursued its receivership application. Attached and marked as Exhibit "M" to this my affidavit is a true copy of my letter to the Credit Union and UM Financial.
24. Initially, the *Shari'a* advisory board sought to participate in settlement discussions between UM Financial and the Credit Union. On July 25, 2011, Shahzad Siddiqui, counsel acting under my instructions, and counsel to the Credit Union attended before Madam Justice Mesbur on a 9.30 hearing at the Commercial List court. In her endorsement, Justice Mesbur wrote, "Mr. Siddiqui wishes to have the Shariah board participate in the Settlement Conference scheduled for July 27/11. The Board is not a party to the proceedings nor has it obtained leave to intervene. The applicant opposes the Board participating. Under the circumstance I cannot permit a non-party to participate. If Mr. Siddiqui & Board members wish to be available to answer questions or provide information to any party, they are free to do so at the settlement conference." Attached and marked as Exhibit "N" to this my affidavit is a true copy of the endorsement of Justice Mesbur dated July 25, 2011.
25. On July 27, 2011, I made myself available, with counsel, to answer any questions or provide information to any party at the settlement conference.
26. I did not decide to intervene in the proceedings until I got notice of a potential class action lawsuit by clients of UM Financial against the Credit Union. Attached hereto and marked as Exhibit "O" to this my affidavit is a true copy of an undated, signed letter from Adekusibe Fola. I am advised by my counsel and do verily believe that he received a copy of this letter on September 14, 2011.

27. Initially, I wanted to participate in the court proceedings in order to ensure that the *Shari'a* concerns were aired in court by a *Shari'a* expert. However, now I am concerned that myself and members of the board may be exposed to litigation on the basis that we have certified the *Shari'a* compliance of products offered by the Credit Union in partnership with UM Financial and that members of the community have relied on us and our *fatawa* in engaging with UM Financial and the Credit Union. In certifying products offered by the parties, we faced *Shari'a* compliance risk, which has been defined by Shaikh Yusuf DeLorenzo as “the possibility that a financial service or product is not *or will not be* in compliance with established Shari’ah precepts and principles [emphasis supplied].” Attached hereto and marked as Exhibit “P” to this my Affidavit are true copies of our *fatawa* and the first page of the article by Shaikh Yusuf DeLorenzo in the *Chicago Journal of International Law* defining *Shari'a* compliance risk.

28. If Credit Union succeeds in its application for receivership, and the Islamic structure is collapsed so that clients of UM Financial are dealing directly with the Credit Union, this would render the whole structure non-*Shari'a* compliant, leaving the families who have relied upon us with either the choice of dealing with conventional banks or selling their cherished homes. As such, the board and myself personally face considerable reputational risk and may never be able to sit on another advisory board for an Islamic finance company in Canada in the future.

29. Solution: Continue to Fund while Waiting for Replacement

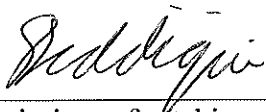
30. In my view as Chairman of the independent *Shari'a* board, the Credit Union should continue to fund the existing pool of 181 families that have obtained their mortgage through UM Financial and the Credit Union.

31. In the alternative, the Credit Union should continue to wait for a replacement funder and work towards amicable solution with UM Financial instead of pushing it into receivership and leaving over 180 families in a very difficult position.

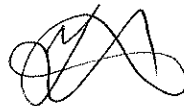
32. The issues raised in this litigation are important and relevant to the Islamic finance industry in Canada and America as a whole. On September 26, 2011, Harvard University is holding a forum entitled, “Islamic Finance: Bankruptcy, Financial Distress and Debt Restructuring” under the auspices of the Islamic Finance Project at Harvard Law School. Attached hereto and marked as Exhibit “Q” to this my Affidavit is a true copy of the forum invitation from Harvard Law School.

33. I make this affidavit in support of a motion for the independent *Shari'a* board of UM Financial to intervene in the application to appoint a receiver over UM Financial and UM Capital Inc. by the Credit Union and for no other or improper purpose.

Sworn Before Me)
this 19th day of September, 2011)
at the City of Toronto,)
in the Province of Ontario.)



A Commissioner for taking Affidavits, etc.



Mufti Yusuf Panchbaya