

CITATION: Skymark Finance Corporation v. Mahal Venture Capital Inc. et al.,
2023 ONSC 2354
COURT FILE NOS.: CV-21-00664778-00CL
DATE: 20230510

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:)
)
 SKYMARK FINANCE CORPORATION) *George Benchetrit*, for the Applicant
)
 Applicant)
)
 – and –)
)
 MAHAL VENTURE CAPITAL INC. and) *Lisa S. Corne and David P. Preger*, for the
 GOLDEN MILES FOOD CORPORATION) Respondent, Santokh Mahal
)
 Respondents) *Chris Burr*, for KSV Restructuring, as
) Receiver and Trustee of Golden Miles
) Food Corporation
)
) *Dylan A. Chochla*, for Alvarez & Marsal
) Canada Inc., as Court-appointed Receiver
) of Skymark Finance Corporation
)
) **Heard: March 13, 2023**

MCEWEN, J.

ENDORSEMENT

[1] Santokh Mahal (“Mahal”) seeks a declaration that his security interest in the personal property of Golden Miles Food Corporation (“Golden Miles”) is valid, enforceable and ranks in priority to any other security interests registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the “PPSA”) and secures repayment of principal advances in the amount of \$2,182,914, plus interest and costs.¹ The Applicant, Skymark Finance Corporation (“Skymark”), opposes Mahal’s motion. KSV Restructuring Inc., in its capacity as Court-appointed receiver and

¹ With the exception of prior-ranking securities in favour of Bank of Nova Scotia (“BNS”), Caterpillar Financial Services Limited (“Caterpillar”) and any equipment financed by Skymark.

Trustee in Bankruptcy of Golden Miles (“KSV” or the “Receiver”), also generally opposes the motion with one exception explained below.

[2] For the reasons that follow, I allow Mahal’s personal claim in the amount of \$281,600 but dismiss the remaining \$1,901,314 in relief sought.

BACKGROUND

[3] Mahal is the sole shareholder, officer and director of Golden Miles. In the fall of 2020, Golden Miles planned to commence operation of a flour mill, which had not yet begun and has not subsequently occurred.

[4] On December 14, 2020, Mahal, on behalf of Golden Miles, as borrower, executed a promissory note (the “Promissory Note”) and a general security agreement (the “GSA”) to himself.

[5] Mahal’s security interest under the GSA was registered pursuant to the relevant provisions of the PPSA. The schedule in the Promissory Note showed advances made between March 18, 2016 and October 20, 2020 in the amount of \$24,101,776.

[6] Ultimately, in October 2021, Skymark brought an Application to put Golden Miles into receivership. Skymark was owed approximately \$29.5 million. The Application was successful and KSV was appointed Receiver over Golden Miles and another corporation owned by Mahal’s son. Collectively, the two companies owned or planned to use the flour mill in question.

[7] Thereafter, in November 2021, Mahal brought a motion seeking a declaration of secured debt in the amount of CAN \$3,183,305.08 and US \$328,000. These funds were purported to have been advanced after December 15, 2020 and immediately after the execution of the Promissory Note and the GSA. None of this debt was contemporaneously recorded in the schedule to the Promissory Note (the “Schedule”).

[8] Subsequently, in December 2021, Mahal filed a Supplementary Record before this Court limiting his claim to advances made in the amount of CAN \$2,182,914 (the “Advances”). The Supplemental Record was largely based on bank records which demonstrated funds advanced by Mahal, as well as other corporations controlled by him, to Golden Miles as follows:²

<u>Advancing Party</u>	<u>Aggregate Advances</u>
Mr. Mahal, personally	\$ 281,600.00
CanadaFresh Corporation	\$ 1,493,310.00
J.T. International Inc.	\$ 395,000.00
King MSP	<u>\$ 13,004.00</u>
Total:	\$ 2,182,914.00

² KSV does not oppose the advance made by Mahal personally. Skymark does.

[9] On this motion, Mahal has restricted his claim to the aforementioned \$2,182,914. He has abandoned any claims prior to the execution of the GSA, presumably on the basis that it would constitute an improper preference.

ONUS OF PROOF

[10] The onus to prove the validity and amount of a creditor's indebtedness is on the creditor – here, Mahal. Thereafter, the creditor does not have to demonstrate that a claim is not an equity claim. Another creditor who chooses to assert such an argument must bear the onus of proving that an otherwise proven debt claim is more properly characterized as an equity claim: see *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 569, 34 C.B.R. (6th) 226, at para. 141.

POSITION OF MAHAL

[11] First, Mahal submits that his uncontroverted affidavit evidence, upon which he was not cross-examined, confirms that he made the four Advances set out in the aforementioned chart after the execution of the Promissory Note and the GSA. This is evidenced by his personal bank account statements, cheques and indirectly from the accounts of his wholly owned companies, CanadaFresh Corporation (“CanadaFresh”) and J.T. International Inc. (together the “Mahal Corporations”). Insofar as the advances made by King MSP are concerned, Mahal deposed that King MSP provides money transfer services to CanadaFresh.

[12] In this regard, Mahal further argues that the fact that the Schedule to the Promissory Note did not evidence the Advances is immaterial since KSV does not oppose Mahal's personal claim for \$281,600, which was also not contained in the Schedule. Mahal therefore submits that any argument advanced by KSV with respect to the Mahal Corporations is therefore inconsistent with its position concerning the \$281,600 that Mahal personally advanced which KSV does not oppose.

[13] Mahal also, relying again on *U.S. Steel*, submits that it is important to look at the “underlying substantive reality” of the transaction, which are factual matters. In this regard, Mahal relies upon Wilton-Siegel J.'s following statement at para. 217:

In addition, in a wholly-owned subsidiary relationship, there is no need for extensive documentation, nor is there a need for types of contractual protections typically found in commercial loan agreements. Given the parent's ability to control the subsidiary's actions as its sole shareholder, there is also no need for a strict schedule of repayment of principal. Further, there is no reason why a parent corporation would enforce any rights on default that may arise in the course of a loan so long as the parent corporation believes that the subsidiary has value. Such rights are asserted only as required to protect the parent corporation in the event that a third party asserts its rights as a creditor against the subsidiary or to terminate the parent corporation's support of the subsidiary.

[14] Further, in this regard, Mahal relies upon the decision of MacLeod J., as he then was, in *Maisonnette et al. v. Langlois et al.*, 2021 ONSC 3587, wherein he stated at paras. 26-28:

I have not been provided with any authority that a promissory note as such is a precondition to the validity of a floating charge such as a GSA or to the priority given to security registered under the PPSA.

...

All creditors, secured or not, will have to prove the amount owing and the terms of the loan such as interest rate, due date, acceleration provisions or any other terms and conditions. A new promissory note might have been a useful document for that purpose, but it would not be the only acceptable proof of the debt. Shareholder loans would normally be recorded in the corporate books and records (which would presumably have been in the control of the plaintiff as the CFO).

...

[I]t is not self-evident that a promissory note would have been essential for the validity of the security and even if it was, it could have been simply remedied by a subsequent note.

[15] Mahal further submits that based on “the underlying substantive reality” of the transactions in this case, there is ample evidence by way of the Promissory Note, GSA, accounting records and financial statements of Golden Miles to evidence the parties’ intention to treat the Advances made by and on behalf of Mahal as debt. The failure to complete the Schedule to the Promissory Note to record Advances made after December 2020, Mahal submits, is a mere technicality which was cured when he attached a continuation to the Schedule in 2022.

[16] Mahal argues that he always had a belief that, as a lender, he would be repaid both with respect to his direct and indirect Advances. Once again, he relies on his uncontroverted affidavit evidence, upon which he was not cross-examined, and the fact that when the GSA was obtained and registered in December 2020, the projected statement of income for Golden Miles forecast significant revenue.

[17] In all of these circumstances, Mahal asserts that it was reasonable for him to expect repayment of his loans with interest. Insofar as interest is concerned, he submits that the fact that there was no interest rate noted in the Promissory Note is not a basis for concluding that he did not expect to receive interest payments on the Advances. He relies on s. 3 of the *Interest Act*, R.S.C. 1985, c. I-15 that provides that where no rate of interest is fixed by way of agreement the rate of interest shall be five percent per annum.

[18] Second, insofar as the indirect Advances are concerned – those being the Advances made by the Mahal Corporations and King MSP – Mahal argues that the GSA secures both direct and indirect indebtedness owed by Golden Miles to Mahal. Further, that indebtedness arising from funds advanced to Golden Miles by the aforementioned third parties controlled by Mahal fit squarely within the meaning of indirect indebtedness as secured by the GSA. In this regard, Mahal relies upon the definition of indirect set out in the Collins Dictionary and the Oxford Learner’s Dictionary, respectively:

Indirect, adj. An indirect result or effect is not caused immediately and obviously by a thing or person, but happens because of something else that they have done.

Indirect, adj.

1. Happening not as the main aim, cause or result of a particular action, but in addition to it
2. Not done directly; done through somebody/something else
3. Avoiding saying something in a clear and obvious way
4. Not going in a straight line

[19] Similarly, Mahal also relies upon the Black's Law Dictionary definition which defines indirect as the opposite of direct, i.e. through an agent or medium.

[20] Based on these definitions, Mahal submits that the debt held by the Mahal Corporations and King MSP meets the definition of "indirect indebtedness" owing by Golden Miles to Mahal.

[21] On the issue of credibility, Mahal submits that KSV's allegations that he failed to cooperate or made false or misleading statements should be disregarded. He argues that there have been no judicial findings or determinations of dishonesty or bad faith against him and that KSV's attempt to portray him as a person of bad character and lacking credibility is improper, irrelevant and ought to be excluded. Once again, he stresses that he was not cross-examined on any of the allegations concerning his credibility.

[22] Finally, Mahal argues that KSV's attack on his secured claims constitutes an effort to equitably subordinate his rights as a secured creditor. Mahal says there is no jurisdiction for such an attack since his priority as a secured creditor is derived from s. 136 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") which provides that:

Priority of claims

136(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: ...

[23] Additionally, Mahal submits that s. 20(1)(a) and (b) of the PPSA also provide priority of his perfected secured claim. Section 20(1)(a) and (b) read as follows:

Unperfected security interests

20(1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

- (i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the *Creditors' Relief Act, 2010* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has caused seizure of the collateral, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

[24] Mahal therefore submits that based on the evidentiary record, caselaw and statutory regimes in place, he is entitled to the principal amount of \$2,182,914 plus interest and costs as secured by a valid and enforceable security interest made first in priority under the PPSA over Golden Miles personal property, excluding the prior-ranking security in favour of BNS and Caterpillar as well as any equipment financed by Skymark.

POSITION OF KSV

[25] KSV submits that the dispute is not as complicated as Mahal makes it out to be. KSV argues that the dispute involves a simple PPSA issue. In this regard, KSV concedes that Mahal's security is valid, properly registered and enforceable pursuant to the provisions of the GSA.

[26] KSV, however, disagrees about what debt is secured. In this regard, KSV points out that it has never taken the position that Mahal's security is invalid because it is equity as opposed to debt. It also points out that it does not oppose Mahal's personal claim in the amount of \$281,600.

[27] KSV takes exception to the claims being advanced by the Mahal Corporations and King MSP for four reasons:

- (i) the Promissory Note did not record any of the debt being claimed as secured;
- (ii) the significant majority of the indebtedness claimed by Mahal as being secured was advanced by companies not party to the GSA;
- (iii) the indebtedness set out in the Promissory Note is materially contradicted by the financial statements provided to the Receiver; and
- (iv) based on the foregoing, KSV and this Court are being asked to accept Mahal at his word that the Advances were secured debt in circumstances where he lacks credibility.

[28] KSV therefore, while conceding that Mahal's security is valid, submits that it does not secure a valid debt owing by Golden Miles to Mahal, but for the \$281,600 with which KSV takes no position.

[29] I will outline each of KSV's four submissions in turn.

(i) The Promissory Note Does Not Record Any of the Debt as Being Secured

[30] The Promissory Note provides, in part, as follows:

THIS PROMISSORY NOTE is issued to evidence the principal amounts advanced, any repayments on account thereof and the unpaid balance of the principal amount outstanding from time to time. The Lender is hereby authorized to endorse on the schedule annexed hereto, or any continuation schedule which may at any time be attached hereto, the date and amount of each advance, and each payment of principal on account thereof, together with the unpaid balance of the principal amount outstanding owing by the Borrower to the Lender. Each such endorsement shall be prima facie evidence of the amounts so advanced and repaid and, in the absence of manifest mathematical error, this promissory note shall be conclusive evidence of the amount of the Borrower's liability to the Lender for the unpaid balance of the principal amount outstanding owing by the Borrower to the Lender.
[Emphasis added.]

[31] KSV submits that the Promissory Note simply creates "evidence" of Golden Miles' indebtedness to Mahal from time to time and constitutes "conclusive evidence" of that debt.

[32] KSV, however, stresses that in Mahal's first motion record he produced no evidence of debt except the Promissory Note. It was not until October 24, 2022 that Mahal updated the Schedule attached to the Promissory Note to include the indebtedness in issue on this motion. KSV therefore distinguishes this case from *Maisonneuve* case relied upon by Mahal. Unlike in *Maisonneuve*, where there was no Promissory Note whatsoever, here, we have a Promissory Note which does not include the debt now claimed. KSV submits that this is an important omission in a situation where Mahal is competing with other valid debt claims of other creditors and failed to set out his debt at the earlier opportunity.

[33] Of import is the fact that while the Promissory Note purports to be "conclusive evidence" of the quantum of indebtedness owed by Golden Miles to Mahal, none of this indebtedness was noted in Mahal's original motion for a declaration for security; nor was it recorded in the Promissory Note until a supplementary Schedule was provided, 11 months after the aforementioned motion and 11 months after Golden Miles was bankrupt.

[34] In these circumstances, KSV submits that Mahal has failed to establish his onus in proving that the Advances (save and except Mahal's own advance) were made on a secured basis.

(ii) Advances by the Mahal Corporations are not Secured by the GSA

[35] While KSV concedes that it is open to the Court to determine that the \$281,600 actually advanced by Mahal to Golden Miles after December 14, 2021, is valid indebtedness, secured by the GSA, it submits that no such remedy is available for the remaining \$1,901,314 advanced by Golden Miles to the Mahal Corporations.

[36] KSV points out that, significantly, the Mahal Corporations are not parties to the GSA nor have they registered a PPSA financing statement. KSV stresses that there are no debt documents

whatsoever between the Mahal Corporations and Golden Miles. There is only evidence of the Advances.

[37] KSV submits that the lack of a PPSA filing is particularly important since the PPSA is, by its nature, a technical statute for the purpose of conferring a substantial benefit to a creditor: that of being a secured creditor. That was not done here with respect to the Mahal Corporations and KSV concedes that while there may be a debt, it was not secured.

[38] Insofar as Mahal's argument that the Advances constitute indirect indebtedness owed by Golden Miles to Mahal, KSV makes a number of submissions.

[39] First, it submits that Mahal's position contains a fundamental error about the nature of the obligations amongst himself, Golden Miles and the Mahal Corporations. KSV argues that a debt owed by a borrower (Golden Miles) to a corporation (the Mahal Corporations) is not a debt owing indirectly "to the shareholders (Mahal) of those corporations". A shareholder's interest in the accounts receivable of a corporation is not a debt claim. Shareholders are merely entitled to the residual equity value of a corporation after all creditors have been paid.

[40] Based on the foregoing, KSV submits that Mahal's interest in the debt owing by Golden Miles to the Mahal Corporations is an equity interest in the residual value of that receivable after all other creditors of the corporation have been paid. It is not an indirect claim and is in fact not a debt claim whatsoever.

[41] Second, KSV submits that there is no authority to support the proposition that money advanced by a corporation, at the direction of a secured creditor, constitutes an indirect payment. Again, KSV relies upon the technical provisions of the PPSA. Reference to the debt in the Promissory Note, says KSV, cannot possibly extend to secured claims of related parties; otherwise, this would create chaos. Unknown parties could have secured interests thus securing unknown claims. In the real world, other creditors cannot search against the debtor to understand the universe of its secured creditors.

[42] Notwithstanding the lack of authority, KSV submits that the jurisprudence concerning "all obligations clauses" are analogous and instructive. By way of explanation, "all obligations clauses" provide that security granted by a borrower secures all future obligations of the borrower to the secured party, regardless of how the obligations are incurred. These cases essentially arise where secured creditors purchase third party debt from other creditors and then assert that the purchased debt is secured. Such clauses have become subject to scrutiny by the courts.

[43] KSV relies upon the Court of Appeal for Saskatchewan's decision in *CPC Networks Corp. v. Eagle Eye Investments Inc.*, 2012 SKCA 118, 405 Sask. R. 86, at para. 38 in which the court dealt with an "all obligations clause" and a situation where CPC had granted a GSA to a bank to secure the bank's interest. The bank then assigned the GSA to Eagle Eye, a company that had a separate unsecured claim against CPC. Eagle Eye thereafter claimed that the assigned GSA converted its unsecured claim into a secured claim. The Court of Appeal disagreed. Amongst other things, it concluded that it could not have been the intention of the parties to allow the GSA to turn an unsecured claim into a secured one via an assignment.

[44] KSV submits that the decision in *CPC* is analogous to the within case. Here, KSV submits that no party could objectively conclude that the parties to the GSA (in which Mahal executed both on behalf of himself and Golden Miles) could have been intended by the use of the term “indirect” to secure obligations owing by Golden Miles to the Mahal Corporations which are nowhere referenced to or contemplated by the GSA.

[45] KSV also relies upon scholarly comment that supports the contention that courts should cast a critical eye upon a secured party who buys up unsecured debt and then asserts a secured claim: see Ronald Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2022).

[46] Last, in this regard, KSV submits that had Mahal and Golden Miles intended for the Advances made to Golden Miles by the Mahal Corporations to be secured by the GSA, they could have done so in a number of different ways, including: naming the Mahal Corporations as secured parties in the GSA and registered against Golden Miles under the PPSA; Golden Miles could have issued a promissory note and security to the Mahal Corporations; and the Mahal Corporations could have made Advances to Mahal who thereafter could have loaned the money to Golden Miles as a direct indebtedness between Mahal and Golden Miles.

[47] Golden Miles and Mahal did none of the above. KSV submits that it would be unfair and prejudicial to the creditors of Golden Miles to infer a self-serving intention to make non-parties to the GSA secured creditors.

(iii) The Golden Miles Financial Statements

[48] KSV submits that the financial information and reporting provided to it is unreliable, inconsistent and does not support Mahal’s position that the Mahal Corporations have a secured claim. In support of this point, KSV alleges that the books and records of Golden Miles, provided at the direction of Mahal, are extremely deficient and that very limited financial information and reporting has been made available to the Receiver.

[49] KSV relies upon the fact that the indebtedness, as set out in the Promissory Note Schedule, is materially contradicted by the financial statements provided to the Receiver for the period prior to December 2020. While KSV concedes that this indebtedness is not the subject matter of this motion, since Mahal has limited his claim to Advances made after December 2021, it is nonetheless noteworthy that the historical financial statements are inconsistent.

[50] KSV also points to the 2021 unaudited financial statements produced by Mahal, including unaudited financial statements for Golden Miles, which it submits are not credible. The Receiver’s concerns, set out in the Supplement to its Fourth Report, resulted in letters being sent by the Receiver to Mahal’s accountant for clarification. There has been no response.

[51] KSV further notes that the unaudited 2021 financial statements were based solely on the same information contained in Mahal’s motion records and telephone conversations with Mahal. Mahal explains that he had the 2021 financial statements prepared, even though Golden Miles has been bankrupt since November 2021, since they were required to collect tax refunds following his acquisition of the Golden Miles assets. KSV challenges this explanation, arguing that, amongst other things, Mahal had no authority to requisition or sign off on the 2021 financial statements

given the bankruptcy, nor is KSV aware of any other information other than that contained in Mahal's motion record that was provided for preparing the financial statements.

(iv) Mahal's credibility

[52] Based on the foregoing, KSV submits that while it is not asking the Court to make adverse credibility findings against Mahal since his claim fails on the above issues, the aforementioned deficiencies cannot be ignored and Mahal therefore cannot be taken at his word that the secured debt exists.

[53] The Receiver also points to other areas where Mahal was uncooperative during the receivership, as set out in its Fourth Report. These instances include Mahal's failure to co-operate with the Receiver, which forced the Receiver to bring a motion for disclosure and compliance, making false statements and attempting to enforce a sham trust.

POSITION OF SKYMARK

[54] Skymark relies upon the submissions of KSV with one exception.

[55] Unlike KSV, Skymark takes issue with the \$281,600. Skymark submits the only evidence put forth by Mahal consists of redacted bank account statements. There is no evidence that these payments amount to loans by Mahal to Golden Miles other than his bald and self-serving statements to that effect. Further, Mahal failed to answer questions as to where the \$281,600 came from and, as such, I should draw an adverse inference against him.

[56] Based on the above, Skymark submits that the money paid by Mahal could have been for any reason including repayment of debt, equity or some other obligation.

[57] In the circumstances, Skymark concludes that Mahal has failed to establish that the money he paid constitutes a secured debt. Skymark also reminds the Court that the order Mahal seeks with respect to the secured debt excludes any equipment financed by Skymark.

ANALYSIS

[58] I accept the submissions of KSV. I am prepared to accept that the \$281,600 directly advanced by Mahal plus interest at the rate of five percent and costs is secured by the GSA and registered first in priority under the PPSA, excluding the prior ranking security in favour of BNS and Caterpillar, as well as the equipment financed by Skymark. Otherwise, Mahal has failed to establish that the Advances made by the Mahal Corporations are indirect debts owing to Mahal and they are secured by the GSA.

[59] First, insofar as the Advances of the Mahal Corporations and King MSP are concerned, the Promissory Note, based on its plain wording, does not create any evidence of indirect indebtedness to the Mahal Corporations or King MSP. Further, I accept KSV's submissions and the caselaw it relied upon that there is no support for Mahal's submission that the Advances constitute an indirect debt. There is simply no documentation that would support this submission. On the other hand, I accept KSV's submission that the Court of Appeal for Saskatchewan's decision in *CPC* is analogous. To allow such a claim would cause considerable mischief, as noted

by KSV, wherein other parties, particularly creditors, could not understand a company's secured debt obligations. Last, I accept KSV's submissions that a debt owing by Golden Miles to one of the Mahal Corporations does not constitute an indirect debt to the shareholder of that corporation, i.e. Mahal. Mahal's interest in the Mahal Corporations does not constitute a debt claim.

[60] It bears noting that Mahal's counsel conceded in argument that there was a lack of documentation that one would typically see in loan transactions, making this a highly unusual case. Further, as KSV points out, the Mahal Corporations are not parties to the GSA.

[61] It further bears noting that the scarce document that was provided suffers from the problems set out by KSV at paras. 49-51 above. Much of the documentation produced does not deal with the Advances from the Mahal Corporations and it cannot be ignored that Golden Miles had a history of inaccurate financial reporting. Mahal could have easily better recorded the Advances made by the Mahal Corporations; he failed to do so.

[62] While I am not prepared to make adverse findings of credibility against Mahal as he was not cross-examined on his affidavit, I conclude that in reviewing the surrounding circumstances as urged upon me by Mahal, they do not militate in his favour given the poor record keeping and lack of supporting documentation.

[63] It did not assist Mahal in that KSV and Skymark have faced a moving target during the litigation with respect to evidence concerning the Advances. First, the Promissory Note did not provide any evidence or support of the indebtedness now claimed by Mahal. Later, the amounts changed over time as he altered the theory of his case and whether he was going to seek priority over Skymark's claims.

[64] Last, this case does not resemble the fact pattern in *U.S. Steel*, the case relied upon by Mahal. *U.S. Steel* involved much more sophisticated claims and complicated legal arguments. Further, the passage Mahal cites from *U.S. Steel* is premised on the existence of a wholly-owned parent-subsidary relationship, distinguishable from the relationships in this case. The Court in *U.S. Steel* held that the need for extensive documentation and contractual protections typically found in commercial loan agreements is generally unnecessary between a wholly-owned parent and its subsidiary. Mahal, in relying on this passage from *U.S. Steel*, seeks to apply it to parties that are not in the same wholly-owned parent-subsidary relationship. However, it appears that the wholly-owned nature of the relationship is key to this Court's finding in *U.S. Steel*. The basis upon which the Court found that a strict schedule of repayment was unnecessary was that a parent company can control the subsidiary's actions as its sole shareholder. For that reason, the parent would not need a strict schedule of repayment and would not need to enforce its rights on default so long as the wholly-owned subsidiary still had value (subject to third party creditor claims). That structure is not the same between the parties in this case; therefore, Mahal cannot rely on this finding from *U.S. Steel*.

[65] It also does not assist Mahal that there was no rate or interest noted in the Promissory Note, which does not evidence an intent to repay.

[66] As stated above, I am, somewhat reluctantly, prepared to allow Mahal a declaration that the principal amount of \$281,600 plus interest and costs is due and owing by Golden Miles to him

based on the transfers he directly made. His personal claim does not suffer from the deficiencies that I have found with respect to the Mahal Corporations and King MSP, which include the indirect nature of the claims, lack of supporting documentation (although that too exists to some extent here), lack of support in the existing caselaw and insufficient recordkeeping. KSV took no position in this regard. Moreover, I do not find KSV's declination to take a position on Mahal's personal claim for \$281,600 to be inconsistent with its arguments with respect to the Mahal Corporations.

DISPOSITION

[67] Based on the foregoing, an order shall go declaring that the principal amount of \$281,600 plus interest at the rate of five percent per year until paid, plus costs on an actual indemnity basis is due and owing by Golden Miles to Mahal and secured by a valid and enforceable security interest registered first in priority under the PPSA over Golden Miles' personal property, excluding any claims by BNS, Caterpillar and Skymark. The remainder of Mahal's claims are dismissed.

[68] Insofar as costs are concerned, success was divided although KSV and Skymark enjoyed much greater success than Mahal.

[69] In these circumstances, after hearing submissions on quantum, I award KSV partial indemnity costs in the amount of \$75,000 including \$25,000 with respect to the Receiver's costs, for which there is clearly authority in the caselaw, all inclusive, to be paid by Mahal.

[70] I award Skymark partial indemnity costs in the amount of \$20,000, all inclusive, also to be paid by Mahal.



McEwen J.

Date: May 10, 2023

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BETWEEN:

SKYMARK FINANCE CORPORATION

Applicant

– and –

MAHAL VENTURE CAPITAL INC. et al.

Respondent

ENDORSEMENT

McEwen J.

Released: May 10, 2023