

Court File No. CV-21-00664778-00CL

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

B E T W E E N:

**SKYMARK FINANCE CORPORATION**

Applicant

- and -

**MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD  
CORPORATION**

Respondents

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

**RESPONDING PARTIES' FACTUM  
(Application Returnable July 20, 2011)  
(on Applicant's Motion to Appoint Receiver)**

July 19, 2021

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## RESPONDING PARTIES' FACTUM

### PART I - INTRODUCTION

#### A) OVERVIEW

1. Skymark asks for the appointment of a receiver to take possession of and sell the assets owned by Mahal and Golden Miles. Mahal owns the Real Property upon which Golden Miles constructed a flour mill (the "Mill").
2. Skymark asserts that such an order is just and convenient and in the interest of all of the stakeholders.
3. The basis of the application is Skymark's assertion that Mahal owes Skymark \$19,045,486.00 under three separate Mortgage Commitments to advance \$20mm secured by three separate mortgages on the Real Property (the "Mahal Loans"), and that Golden Miles owes Skymark \$9,972,437.00 under loans secured by PPSA registered security (the "GM Loans").
4. Mahal acknowledges advances under Mahal Loans but there is a material dispute over the amount alleged due for the Mahal Loans. Golden Miles acknowledges some advances but there is a material dispute over the amounts alleged by Skymark to have been advanced under the GM Loans.
5. Mahal asserts that the total advanced under the Mahal Loans was \$12,233,031.75. Golden Miles asserts that the total advanced under the GM Loans was \$2,159,499.48. Between August, 2020, and April, 2021, Golden Miles paid Skymark \$1,882,694.54 on account of the GM Loans. Golden Miles says that the balance due under the GM Loan, with interest and fees is

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\$1,139,433.97, not the \$9,972,437.18 alleged by Skymark at paragraph (i) of its Notice of Application.

6. Further, Golden Miles' equipment is secured in the amount of \$24mm to a debtor with a PPSA registration with priority over Skymark's.

7. The Debtors dispute that when the NITES were delivered and when this application was commenced that they were in default under the Mahal Loans or the GM Loans which, by agreement of Skymark and Mahal and Golden Miles, were not due until the Mill was in production. Further, Golden Miles did not execute and is not a party to the Forbearance Agreement, the breach of which is said by Skymark to justify the appointment of a receiver over the assets of Golden Miles.

8. The Mill employs eight individuals and will be the largest capacity automated flour mill in North America.

9. The Mill is on the cusp of commencing full production on two 12 hour shifts per day. It will produce 800 tons of flour per day at full production.

10. When in production, the Mill will generate a net annual profit of \$60,000,000.

11. There is no need for a receiver to take possession, preserve, market and sell the Real Property with the Mill to maximize value for Skymark and the Debtors' other stakeholders. Golden Miles is a solvent company with sufficient resources to satisfy the full amounts due under the Mahal Loans and the GM Loans once the actual amounts due is determined.

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12. There is sufficient value in the Mill as a going concern to satisfy claims by all stakeholders including Skymark and Vicano, whose interests are in any event protected by its construction liens registered against the Real Property. All three of the mortgages registered by Skymark over the Real Property are building mortgages as defined in both the Construction Lien Act and the Construction Act which therefore have priority over Skymark's three mortgages to the extent of any deficiency in the holdback funds.

13. Further, Golden Miles is prepared to post an irrevocable letter of credit from a Schedule 1 bank to stand as security for the full amount that Skymark claims to be due under the Mahal Loans until the appropriate Mahal Loan and GM Loan balances due are determined by this court on a trial of that issue.

14. Under these circumstances, it is not just or convenient to appoint a receiver over the assets of the Debtors including the Real Property to maximize value for Skymark.

## **PART II - SUMMARY OF FACTS**

15. The debtors are related companies. Mahal is the registered owner of the land and building known as 155 Adams Blvd., Brantford, Ontario (the "Real Property"). Golden Miles operates out of the Real Property and elsewhere and is in the business of importing and exporting food products and the manufacturing of various food products. Golden Miles will be processing grain for the production of flour and flour-based products from the Real Property.

### **Mahal Loans**

16. Skymark extended three loans to Mahal by virtue of three Commitment letters secured by mortgages on the Real Property. Skymark issued these Commitment letters to Mahal:



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- a. June 8, 2015 for \$4 million
- b. November 30, 2016, for \$9.6 million
- c. September 4, 2018, for \$6.4 million.<sup>1</sup>B-1-9

17. The common theme to each of the three Commitment Letters was that the mortgage security was taken to secure the financing of an improvement, the construction of the Mill.<sup>2</sup>B-1-9

18. Also common to all three mortgage Commitment Letters was the obligation by Skymark to advance in stages as construction progressed against architect's certificates. Payments were to be made by Skymark directly to Vicano.

19. Philip Cohoon Architecture ("Cohoon") was the payment certifier for the Mill construction. Golden Miles arranged for Cohoon to provide Skymark with every certificate for payment issued to Vicano as construction progressed.

20. From the outset, Skymark was delinquent in the timing of its payments under the Mortgage Commitments. Skymark's last payment to Vicano was made on November 26<sup>th</sup>, 2018, in the amount of \$1,500,000.00. That left an unpaid, but architect approved, balance of \$204,350.71 owing to Vicano.

21. The delayed payments caused friction with the contractor, Vicano which delayed progress on the Mill. The delinquency increased to the point that by March 31, 2019, Vicano's receivable

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<sup>1</sup>Responding Parties Application Record Affidavit of Santokh Mahal, sworn July 5, 2021(the 'Mahal Affidavit') para. 15-17

<sup>2</sup> For para. 17-24 hereof; Mahal Affidavit paras. 18-25

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based on approved Cohoon architect's certificates was \$3,074,498.48. This amount was payable by Skymark under its Commitment Letters to Mahal. As a direct result of not receiving payment on its Cohoon approved payment certificates, Vicano walked off the Mill site and abandoned the work in April, 2019 and registered the two construction liens referred to in paragraph 34 and exhibits K and L of the June 24<sup>th</sup> Millar Affidavit for \$5,079,998.47.

22. As of November 26<sup>th</sup>, 2018, Skymark had only advanced \$11,213,832.00 to Vicano of the total of \$20,000,000.00 it had committed to advance under the three Commitment Letters.

23. Skymark made two further advances under the Commitment Letters. In January, 2019, it paid \$650,000 of the total of \$950,000 payable to MSM, a mechanical contractor on the Mill and in July, 2019, it paid \$454,405.84 to Coco Paving, which had performed site work and paving for the Mill.

24. As of July, 2019, Skymark had advanced only \$12,315,237.82 from the \$20,000,000 it had contracted to advance under the three Mahal loan Commitment Letters. No further advances have been made by Skymark on the Mahal loans.

25. Mahal and Golden Miles request leave to initiate in the Commercial List an action against Skymark for damages resulting from Skymark's failure to advance the agreed \$20 million due under the Commitment letters.

**Skymark Inability to Document Advances under the Mahal Loans**

26. In paragraphs 15, 18 and 21 of Paul Millar's affidavit sworn June 24<sup>th</sup> (the "First Affidavit"), he says that the total advances under the three Commitment letters was \$12,240,055.00 including the initial \$1,000,000.00 advance for the purchase of the Real Property.

27. In the NITES dated May 28,2021, attached as exhibit Y to the First Affidavit, Millar says that the Mahal Loan total as at May 1, 2021, including interest, was \$18,786,820.20 which includes what is identified as interest on the initial \$1 million advance totaling \$113,805.36.

28. Michael Slattery, at Q 28 and 32 of the transcript of his examination as a witness on a pending Application acknowledged that Mahal had paid the interest on the \$1 million to April, 2021. B-1-138B-1-139

29. Exhibit 1 to the Slattery examination was produced as documentary evidence of all the advances made under the \$9.6 million Commitment letter supporting the \$9,377,251.03 that Millar says was advanced at paragraph 18 of the First Affidavit. Exhibit 1 documents advances to Vicano totalling \$5,000,974.40.

30. Pending determination of the actual balance due under the Mahal Loan, Golden Miles is prepared to post security in the form of an irrevocable letter of credit from a Schedule I or II bank in the full amount of Skymark's claim for the Mahal Loan as substitute security in place of Skymark's mortgages against the Real Property in an amount sufficient to cover accruing interest until the determination of the proper amount due under the Mahal Loan.

**Skymark inability to document balance of Loans to Golden Miles**

31. Starting in October, 2017, Golden Miles signed the series of five HICA agreements referred to in paragraph 26 and exhibits H and I to the First Affidavit. Skymark did not, however, make loans to Golden Miles to finance the purchase of the equipment required in the operation of the Mill. Golden Miles had already purchased and paid for the equipment subject to the HICA agreements. The equipment was intended as collateral for the GM Loans.<sup>3</sup> B-1-11

32. Skymark did advance a total of \$2,159,499.48 on account of the purchase of machinery by Golden Miles by payments made directly to Imas and Horst. These were the only advances made under the HICA agreements used for the purchase of equipment and that is the measure of the debt obligation of Golden Miles to Skymark under the HICA agreements, subject to the payments made by Golden Miles to Skymark set out hereafter.

33. Golden Miles made a series of payments to Skymark from August 2020, to April, 2021, as referred to in paragraphs 45 and 46 of the First Affidavit. Over that period, Golden Miles paid Skymark a total of \$1,882,694.54. Golden Miles asserts that the balance due for the GM Loans as of July 3, 2021, including interest and fees is \$1,139,433.97.

34. That contrasts with the \$10,146,759.56 that Skymark says is due in the NITES found at exhibit Y of the First Affidavit said to result from advances of \$7,532,864.41.

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<sup>3</sup> For paras. 31-33 hereof; Mahal Affidavit paras. 26-33

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35. Michael Slattery at Q210 to 214 of his transcript testified that the GM loan advances totalled \$5,308,702.40 of which about \$2 million was also collaterally secured under the \$6.4 million Commitment Letter. <sup>B-1-141</sup>

### **The Mahal and GM Loan balance dispute**

36. The dispute over the balances due under both the Mahal Loan and the GM Loan arose in July, 2019 and discussions over that issue continued over several months resulting in Mahal and Golden Miles issuing a Superior Court action against Skymark and others claiming an accounting under both the Mahal Loan and the GM Loan.<sup>4</sup> <sup>B-1-13 B-1-17</sup>

37. The action was dismissed in August, 2020, by registrar's order, purportedly on the consent of all of the plaintiffs, including Golden Miles, on the basis of the Forbearance Agreement dated March 12, 2020. Golden Miles has a motion returnable August 18<sup>th</sup> to set aside that dismissal on the basis that it was not a party to the Forbearance Agreement and did not consent to the dismissal.

### **Golden Miles not a party to the Forbearance Agreement dated March 12, 2020**

38. Jesse was not authorized by Golden Miles to make agreements on behalf of Golden Miles in any forbearance agreement negotiated with Skymark. Santosh Mahal, the sole director and officer of Golden Miles, was not involved in the negotiation of the Forbearance Agreement.<sup>5</sup> <sup>B-1-16</sup>

39. As a result, the Forbearance Agreement that was negotiated did not accurately reflect the state of accounts on the GM Loans. For that reason, Golden Miles did not execute it. Golden

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<sup>4</sup> For paras. 36 and 37 hereof; Mahal Affidavit paras. 34-44 and 51

<sup>5</sup> For paras. 38-40 hereof; Mahal Affidavit paras. 45, 46, 47

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Miles' failure to execute the Forbearance Agreement was deliberate and not the result of an "administrative error" as asserted in paragraph 40 of the Miller Affidavit.

40. Golden Miles is not a party to the Forbearance Agreement and cannot be taken to have agreed to the loan balances set out in it.

#### **No Default: The Forbearance Undertaking**

41. The Debtors say that as a precondition to agreeing to the Commitment letters and the GM Loan, the Mahal Loans and GM Loans would be repayable only when the Mill was in full production. The Forbearance Undertaking is acknowledged by Skymark at paragraphs 19, 22 and 23 of the First Affidavit.<sup>6</sup> B-1-13

42. Accordingly, when the NITES was delivered in May, 2021 and when this application was commenced, neither the Mahal Loan nor the GM Loan was in default.

#### **GM Loan PPSA priority issue**

43. Skymark registered a financing statement to secure the GM Loans on May 31, 2021.

44. There is a financing statement registered on December 31, 2020, by Santokh S. Mahal securing the same collateral as the Skymark financing statement which, by virtue of its earlier registration, has priority over Skymark's.

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<sup>6</sup> For paras. 41 and 42 hereof; Mahal Affidavit paras. 34-36

**Golden Miles is not insolvent**

45. The assertion in paragraph 33 of the First Affidavit that the Mill failed to become operational because Mahal and Golden Miles had insufficient funds to pay for completion of the Mill has no foundation.

46. Millar's belief expressed in paragraph 67 of his affidavit that the flour mill is not operating is not accurate. The Mill will be in full production commencing in July, 2021.

47. The Mill has taken longer to complete than initially anticipated. This was primarily because of safety issues resulting from the building design by Vicano and its engineer, Lahnack. Because of the dust generation issue, a flour mill is classified as an F-1 high hazard building under the Ontario Building Code. F-1 buildings can be no more than four stories and cannot have a basement.

48. The Vicano building design had a basement and was six stories. Despite that reality, the City of Brantford issued a foundation building permit that allowed construction to go ahead. It subsequently issued a stop work order until the dust and safety issues were satisfactorily resolved. The resulting additional costs and Golden Miles delay damages are the subject of a consolidated action in Brantford between Golden Miles, Mahal, Vicano and Lahnack. That action is under the direction of a case management judge appointed by the RSJ and is progressing through a case managed timetable.

49. Golden Miles has funded the bulk of the Mill construction. It was as a direct result of Skymark's failure to advance the funds it had committed to advance that Vicano abandoned the

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site. Golden Miles was obliged to retain replacement contractors to complete the work which has only just recently been done.

50. Golden Miles has expended from its own resources \$25 million to complete and equip the Mill.

51. The \$25 million in additional costs were in addition to amounts paid by Skymark to Vicano under the Commitment Letters and prior to Vicano abandoning the work.

52. After Vicano abandoned the work in April, 2019, Golden Miles has disbursed an additional \$10 million in completion costs.

53. There has been over \$50 million expended for the purchase of the land, construction of the Mill and purchase and installation of equipment by Golden Miles which includes construction advances from Skymark under the Commitment Letters.

54. Golden Miles has received 500 tons of grain and has contracted for delivery of an additional 4,500 tons which is being delivered by truck at a rate of 400 tons per day. Golden Miles has purchased a further 20,000 tons of wheat, one month's production, secured by a letter of credit for \$9 million.

55. The Mill is ready to begin full production. There have been four engineers on site commissioning the equipment since May 9, 2021. One month's production will generate \$15.4 million gross resulting in a net monthly profit of \$5 million. Golden Miles has a purchase order for full production.



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56. Golden Miles has eight employees working in the Mill supporting two 12-hour shifts. Each shift requires one miller, one lab tech to test both wheat and flour every two hours and one mechanical employee.

57. The value of the Mill was addressed in an appraisal secured by Skymark in July, 2020 which opined that its fair market value was \$47 million. This was before production.

58. Based on a multiple of earnings, the value of the Mill as a going concern even at three times the current annual profits would be \$180 million.

59. Further, Golden Miles is an operating company producing and marketing food products in operations which do not yet include the Mill. Golden Miles' net profit for the period ending November 30, 2020, was \$7,162,971.98 on sales of \$11,964,113.09.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

60. Issue One: Should the court exercise its discretion under section 243 of the BIA or section 101 of the CJA to appoint a receiver over the assets of either Mahal or Golden Miles when neither debtor is insolvent and there is a serious issue to be tried over the actual amount due under the Mahal Loan and the GM Loan?

61. Issue two: Is the PPSA priorities issue between Skymark and Santokh Mahal a material consideration in the exercise of discretion to determine whether it is just and convenient to appoint a receiver over the assets of Golden Miles?

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62. Issue three: In all the circumstances, is it just and convenient to appoint a receiver over the assets of Mahal and Golden Miles or can the interests of the stakeholders be more appropriately protected in less intrusive ways including the posting of adequate alternative security.

63. The Applicant moves for the appointment of a receiver under section 243 of the BIA and section 101 of the CJA.

64. Under both provisions a court may exercise its discretion to appoint a receiver where it appears to be just and convenient to do so.

### **General Principles:**

#### **i. Just and Convenient Test**

65. Courts have provided guidance on the “just and convenient” test mandated by the legislature and have articulated the test in three parts:

- 1) There must be a prima facie case that the applicant’s right to recovery is in serious jeopardy;
- 2) The moving party would suffer irreparable harm if the motion is refused; and,
- 3) The balance of convenience weighs in the favour of the applicant.<sup>7</sup> B-1-125 B-1-111

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<sup>7</sup> Karen Perron, “The ABCs of Appointing a Receiver” (39<sup>th</sup> annual Civil Litigation Conference delivered at the County of Carlton Law Association, 15 and 16 November 2019) at pg. 6 [“Perron”] and *Garratt v Charlton*, 2012 ONSC 1129 at para 28.

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66. In regards to satisfying this test, the court will consider a number of factors in determining whether it is appropriate to appoint a receiver including, but not limited to, the following:

- a) Whether irreparable harm will be caused if a receiver is not appointed;
- b) The risk to the security holder including the size of the debtor's equity in the assets and the need for preservation and protection of the property;
- c) The nature of the property;
- d) The balance of convenience for all parties;
- e) Whether the creditor has a right to appoint a receiver under its loan and security instruments;
- f) The extraordinary nature of the relief should be granted cautiously and sparingly;
- g) The effect of the order on the parties;
- h) The conduct of the parties;
- i) The anticipated duration and costs of the receivership; and,
- j) The likelihood of maximizing return to the parties.<sup>8</sup> B-1-125 B-1-99

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<sup>8</sup> Perron at pg. 6 and *Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128 at para 26 .

**ii. Section 12(3) and 12(6) of the *Mortgages Act*, RSO 1990, c M.40 (the “Mortgages Act”).**

67. Section 12(3) and 12(6) of the *Mortgages Act* provide for payment into court of a sum of money either due upon the mortgage or a sum in excess of the amount admitted to be due upon the mortgage.<sup>9</sup> Section 12(3) provides that a court may make an order discharging the mortgage upon such payment into court. [H→ S.12\(3\) & 12\(6\)](#)

68. The granting of relief in section 12(3) and 12(6) is a matter of discretion to be determined on a case-by-case basis.

**Issue One**

69. Neither Mahal nor Golden Miles disputes that there exist secured loan agreements or that the loans are now due but both, on serious grounds challenge the amounts said by Skymark to be due.

70. On the fundamental issue of what advances were made under the Mahal Loans, Skymark’s representative, Michael Slattery, acknowledged on his examination that the interest had been paid on the initial \$1 million dollar advance under the June 8, 2015 Commitment letter until April of 2021. Accordingly, as of the May 1 calculation of amounts due under the NITES notice at exhibit Y of the First Affidavit, there would be no interest owing and only \$70,000.00 owing for brokerage fees and lender’s fees for a total of \$1,070,000.00. Yet the NITES reflects a total due, including interest of \$1,395,989.40.

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<sup>9</sup> *Mortgages Act*, RSO 1990, c M.40 at s. 12(3) and s. 12(6).

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71. On the \$9.6 million Commitment letter, Skymark says that the advances were \$9,377,251.03 yet the documents produced at Slattery Exhibit 1 document advances to Vicano totalling \$5,000,974.40.

72. The documentation produced by Skymark to demonstrate advances to Vicano under the three Commitment letters total \$7,467,548.00.

73. The issue under the GM Loans is the same. Skymark, in paragraph 26 of the First Affidavit, says that it made loans to Golden Miles to finance the purchase of equipment totalling \$8,481,950.

74. Michael Slattery, at Q 210 to 214 of the transcript of his examination says that the advances were \$5,308,662.00 but that about \$2,000,000.00 of it was secured under the \$6.4 million Commitment letter.

75. Golden Miles says that only \$2,159,000.00 was advanced for the purchase of equipment.

76. There is a serious issue to be tried as to the actual value of the Debtors' debt obligation to Skymark.

77. Determination of the actual balance due under the Mahal Loan and the GM Loan is a critical first step before a determination can be made as to whether it is just and convenient to appoint a receiver. This is particularly so when there are three different interest rates applicable depending on under which loan agreement the advances were made.

**Issue two**

78. Santokh Mahal has a perfected registration registered prior to that of Skymark securing the collateral that Skymark proposes to have the receiver take possession of. Under those circumstances, the debtor has no equity in the collateral that would be available to Skymark on a disposition under the PPSA which would militate against having a receiver appointed who would otherwise disrupt the business and operations of the debtor.

**Issue three**

79. There is no evidence that the applicant's right to recovery is in serious jeopardy. The Mill is embarking on production of a profitable venture operated by a solvent company, Golden Miles.

80. Irreparable harm will not result if the receiver is not appointed. The Mill has a value in excess of \$50 million, more than enough to satisfy Skymark's three mortgages even if its assertion that the amount due, being \$18,786,820.20, turns out to be accurate.

81. The balance of convenience clearly favours Golden Miles. Appointment of a receiver has the potential to affect the employment of eight people and disrupt production that just started after four years of construction.

82. This is particularly so given Golden Mile's ability, and willingness to post an irrevocable bank letter of credit for the full amount Skymark claims to be due under the three mortgages plus a realistic amount to cover accruing interest while the accounting issue is being tried or otherwise resolved.

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83. For those reasons, Golden Miles is not insolvent and the appointment of a receiver to take possession of the Real Property and equipment to market and sell it is not just and convenient.

**PART IV - ORDER REQUESTED**

84. An order adjourning this application, on such terms as are appropriate with respect to the posting of alternate security pending determination of a trial of an issue or equivalent process to determine the actual amounts due under the Mahal Loan and the GM Loan.

85. An order directing a trial of the issue of the balance due under the Mahal Loans and GM Loans.

86. Directions on a timetable for the completion of the steps required to complete the trial of that issue before the application for appointment of a receiver is determined.

87. An order granting leave to Golden Miles to proceed in this court for declaratory relief under s67(1) of the PPSA to determine questions of priority or entitlement in or to the collateral or its proceeds, if such leave is required.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19<sup>th</sup> day of July, 2021.



KIRWIN PARTNERS LLP

*Lawyers for the Respondents, Mahal  
Venture Capital INC. and Golden Miles  
Food Corporation*

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

**Jurisprudence**

1. *Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128.
2. *Garratt v Charlton*, 2012 ONSC 1129

**Secondary Sources**

1. Karen Perron, “The ABCs of Appointing a Receiver” (39th annual Civil Litigation Conference delivered at the County of Carlton Law Association, 15 and 16 November 2019)



## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

#### INTERLOCUTORY ORDERS

##### **Injunctions and receivers**

**101.(1)** In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

##### **Terms**

**(2)** An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3.

#### **Court may appoint receiver**

- **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
  - **(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
  - **(b)** exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
  - **(c)** take any other action that the court considers advisable.
- **Restriction on appointment of receiver**

**(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

  - **(a)** the insolvent person consents to an earlier enforcement under subsection 244(2); or
  - **(b)** the court considers it appropriate to appoint a receiver before then.

- **Definition of *receiver***

(2) Subject to subsections (3) and (4), in this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

- **Definition of *receiver* — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

- **Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

- **Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

- **Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

- **Meaning of *disbursements***

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

Section 12(3) and 12(6) of the *Mortgages Act*

**Where mortgagee cannot be found**

12(3) When a mortgagor or any person entitled to pay off a mortgage desires to do so and the mortgagee, or one of several mortgagees, cannot be found or when a sole mortgagee or the last surviving mortgagee is dead and no probate of his or her will has been granted or letters of administration issued, or where from any other cause a proper discharge cannot be obtained, or cannot be obtained without undue delay, the court may permit payment into court of the amount due upon the mortgage and may make an order discharging the mortgage.

**When amount offered questioned**

12(6) When the amount admitted to be due upon the mortgage appears to be open to question the court may as a condition of making the order require payment into court of a sum in excess of the amount admitted to be due and in such case the additional sum is subject to the further order of the court.

SKYMARK FINANCE CORPORATION  
Applicant

-and- MAHAL VENTURE CAPITAL INC. et al.  
Respondents

Court File No. CV-21-00664778-09CL

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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