

**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

**FACTUM OF SKYMARK FINANCE CORPORATION
(Motion Returnable January 16, 2023)**

CHAITONS LLP

5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

George Benchetrit (LSO #34163H)

Tel: (416) 218-1141

E-mail: george@chaitons.com

Laura Culleton (LSO # 82428R)

Tel: (416) 218-1128

E-mail: laurac@chaitons.com

**Lawyers for Skymark Finance
Corporation**

TO: DICKINSON WRIGHT LLP
199 Bay Street, Suite 2200, Box 447
Commerce Court Postal Statement
Toronto, ON M5L 1G4

David P. Preger (LSO # 36870L)
Tel: (416) 646-4606
Email: dpreger@dickinsonwright.com

Lisa S. Corne (LSO # 27974M)
Tel: (416) 646-4608
Email: lcorne@dickinsonwright.com

David Z. Seifer (LSO # 77474F)
Tel: (416) 646-6867
Email: dseifer@dickinsonwright.com

Lawyers for Mahal Venture Capital Inc. and Golden Miles Food Corporation

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, Suite 400
Commerce Court West
Toronto, ON M5L 1A9

Chris Burr (LSO # 55172H)
Tel: (416) 863-3261
Email: chris.burr@blakes.com

Lawyers for KSV Restructuring Inc., Receiver

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I - OVERVIEW

1. This factum is filed by Skymark Finance Corporation (“**Skymark**”) in response to the motion brought by Santokh Mahal (“**Mr. Mahal**”) seeking, among other things, a declaration that the security in his favour over all of the personal property of Golden Miles Food Corporation (“**Golden Miles**”), other than inventory, is valid and enforceable, and ranks in priority to any other security interest registered under the *Personal Property Security Act*, RSO 1990, c. P.10, with the exception of specific equipment subject to prior-ranking security in favour of Bank of Nova Scotia (“**BNS**”) and Caterpillar Financial Services Limited (“**Caterpillar**”).

2. Skymark’s position on this motion is summarized as follows:

- (a) Mr. Mahal’s motion should be dismissed in its entirety; or
- (b) alternatively, the maximum relief potentially available to Mr. Mahal is a declaration of priority limited to \$281,600, and (by his own admission) only over creditors other than Skymark, BNS and Caterpillar.

II - FACTS

Background

3. By Order of this Court made on October 1, 2021, KSV Restructuring Inc. (“**KSV**”) was appointed receiver and manager (“**Receiver**”) of the assets, undertakings and properties of Mahal Venture Capital Inc. (“**Mahal VC**”) and Golden Miles Food Corporation (“**Golden Miles**”, and together with Mahal VC, the “**Companies**”) owned or used in connection with the flour mill (the “**Flour Mill**”) located on the property municipally known as 155 Adams Blvd., Brantford, Ontario (the “**Real Property**” and together with the Flour Mill, the “**Property**”).¹

4. On April 11, 2022, this Court approved the sale of substantially all of the Property to 12175622 Canada Inc. (the “**Purchaser**”).²

5. The Purchaser is owned and controlled by Mr. Mahal, who is the owner and sole officer and director of Golden Miles, and the father of Jesse Mahal, the owner and sole officer and director of Mahal VC.³

6. The sale transaction contemplated was completed on May 18, 2022. The aggregate net proceeds received were \$18.47 million (the “**Proceeds**”). Of the Proceeds, \$16 million was allocated to the real property owned by Mahal VC, and \$2.47 million was allocated to the personal property owned by Golden Miles (the “**Personal Property Proceeds**”).⁴

¹ Fourth Report of KSV dated November 1, 2022 (the “**Fourth Report**”) at sections 1.0(1) and 1.0(2).

² Fourth Report at section 2.0(2).

³ Fourth Report at section 2.0(3).

⁴ Fourth Report at section 2.0(4).

7. Distributions of the Proceeds to the Companies' creditors have been delayed as a result of, among other things, the secured claim alleged by Mr. Mahal on this motion.

The Mahal Security Motion

8. The basis for Mr. Mahal's alleged secured claim is a general security agreement dated December 14, 2020 granted by Golden Miles to Mr. Mahal (the "**Mahal GSA**"). The Mahal GSA is executed by Mr. Mahal on behalf of Golden Miles.⁵

9. In support of his motion, Mr. Mahal swore an affidavit on November 21, 2021 in which he deposed that a total of CAD\$27,278,766.46 and US\$328,000 was advanced by him to Golden Miles between March 16, 2016 and September 15, 2021. However, the affidavit indicates that "*for the purposes of this motion, the declaration I seek is limited to CAD \$3,183,305.08 and USD \$328,000, which represents the advances made after December 15, 2020*".⁶

10. On its face, the Mahal GSA was an unlawful preference insofar as it sought to secure prior advances. Mr. Mahal's subsequent claim to priority for only those amounts advanced after the date of the Mahal GSA was designed to avoid any preference issues.⁷

11. Mr. Mahal filed a second affidavit sworn December 17, 2021 (the "**December Affidavit**") in which he deposed: "*To date, I have located documents to support advances of CAD \$2,182,915.08 under the Loan. I am therefore limiting my secured claim against Golden Miles to*

⁵ Fourth Report at section 3.0(2).

⁶ Affidavit of Santokh Mahal sworn November 21, 2021 at para. 8 (the "**November Affidavit**"), Tab 1 to the Responding and Cross-Motion Record of Santokh Mahal.

⁷ Fourth Report at section 3.0(3).

this amount, without prejudice to my right to produce further evidence of additional Loan advances at a later date.”⁸

12. The December Affidavit includes bank statements for a Golden Miles account showing, among other things, (a) cash deposits (\$71,600), (b) transfers of funds from an account in the name of Mr. Mahal (\$210,000), and (c) transfers of funds from accounts held by corporations owned and controlled by Mr. Mahal (\$1,901,314). Mr. Mahal’s position appears to be that all of these cash deposits and transfers constitute loans made by him to Golden Miles which are secured by the Mahal GSA.⁹

13. The deposits/transfers included in the December Affidavit are summarized as follows:¹⁰

Advancing Party	Aggregate Advances
Mr. Mahal, personally	\$281,600
CanadaFresh Corporation	\$1,493,310
J.T. International Inc.	\$395,000
King MSP	\$13,004
Total	\$2,182,914

14. On or about January 14, 2022, Skymark commenced an application against Mr. Mahal and Golden Miles under the *Business Corporations Act* (Ontario) (the “**Oppression Application**”), seeking, among other things, an order (a) that Mr. Mahal’s act of causing Golden Miles to grant the Mahal GSA was oppressive, unfairly prejudicial to or unfairly disregarded the interests of

⁸ Affidavit of Santokh Mahal sworn December 17, 2021 at para. 4 (the “**December Affidavit**”), Tab 1 to the Supplementary Motion Record of Santokh Mahal.

⁹ December Affidavit at paras. 11-20, Tab 1 to the Supplementary Motion Record of Santokh Mahal.

¹⁰ Fourth Report at section 3.0(6).

Skymark as secured creditor of Golden Miles, and (b) varying or setting aside the Mahal GSA as against Golden Miles' personal property that had been pledged to Skymark.¹¹

15. On August 26, 2022, Mr. Mahal filed a further affidavit in which he deposed that “*I do not claim a security interest ranking in priority to Skymark over any of the “Equipment” purchased by Golden Miles with funds advanced by Skymark pursuant to the [Skymark security documents].*”¹²

16. By withdrawing his claim to priority over Skymark, Mr. Mahal addressed the substantive relief claimed in the Oppression Application.

17. Accordingly, based on the concessions in Mr. Mahal's affidavits with respect to the quantum of indebtedness and priority claimed, Skymark understands that the Mahal Security Motion is essentially seeking a declaration that Mr. Mahal has first ranking security over the personal property of Golden Miles, other than equipment pledged to Skymark, BNS and Caterpillar, as security for the total amount of CAD \$2,182,914.¹³

The Receiver's Debt and Security Review

18. The Receiver is not satisfied that there is sufficient evidence of loan advances by Mr. Mahal to Golden Miles after December 14, 2020 (the date of the Mahal GSA), other than at most the \$281,600 in transfers from Mr. Mahal's bank account and cash deposits.¹⁴

¹¹ Fourth Report at section 3.0(7).

¹² Affidavit of Santokh Mahal sworn August 26, 2022 at para. 4, Tab 1 to the Reply Motion Record of Santokh Mahal.

¹³ Fourth Report at section 3.0(11).

¹⁴ Fourth Report at section 3.1(2).

19. The Receiver has expressed four primary concerns with the nature of the evidence of indebtedness that has been provided by Mr. Mahal in connection with the Mahal Security Motion, being:

- (a) No Contractual Evidence of Indebtedness – Mr. Mahal relies exclusively upon a promissory note dated December 14, 2020 allegedly issued by Golden Miles to himself (the “**Promissory Note**”). The Promissory Note includes a schedule of advances, which is populated by 21 advances between the dates of March 16, 2016 and October 30, 2020, totaling \$24,101,776.47. There are no advances recorded after October 30, 2020, and therefore no advances recorded during the relevant period over which the Mahal Security Motion asserts a secured debt.¹⁵
- (b) Advances Made by Third Parties - \$1,901,314 of the \$2,182,914 in deposits/transfers listed in the December Affidavit were made by parties other than Mr. Mahal, namely CanadaFresh Corporation (“**CanadaFresh**”), J.T. International Inc. (“**JTI**”) and King MSP (“**King**”), none of which hold security over the property of, or have PPSA registrations against, Golden Miles.¹⁶
- (c) Inconsistencies with Financial Statements - The indebtedness set out in the Promissory Note is materially contradicted by two different Golden Miles financial statements for the period before December 2020, and no Golden Miles financial statements have been provided to the Receiver for the period after December 14, 2020, which is the period relevant to the Mahal Security Motion.¹⁷

¹⁵ Fourth Report at section 3.1(4-6).

¹⁶ Fourth Report at section 3.1(12-13).

¹⁷ Fourth Report at section 3.1(11).

- (d) Credibility Issues with Mr. Mahal - Given the concerns about an absence of evidence of debt, and advances made by parties other than Mr. Mahal, the Receiver and this Court are being asked to accept Mr. Mahal at his word that funds transfers made by him and companies he controls constitute not only indebtedness, but indebtedness secured by the Mahal GSA. Numerous concerns regarding Mr. Mahal's credibility and his failure to act in good faith have been well documented in these proceedings.¹⁸

III - LAW AND ARGUMENT

No Evidence of Indebtedness

20. As Mr. Mahal concedes, it is his onus to prove the validity and amount of his claim.¹⁹

21. The only evidence put forward by Mr. Mahal are bank account statements showing cash deposits and related party transfers to a bank account held by Golden Miles. No evidence has been adduced that these payments amount to loans by Mr. Mahal to Golden Miles other than his bald and self-serving statements to that effect.

22. As explained above, all but \$281,600 of the \$2,182,914 in deposits/transfers listed in the December Affidavit were advanced by parties other than Mr. Mahal, namely CanadaFresh, JTI and King.

23. Mr. Mahal has refused to answer questions regarding the sources of the \$281,600 in cash and funds transferred to Golden Miles. Specifically:

¹⁸ Fourth Report at section 3.1(25, 27).

¹⁹ Factum of Santokh Mahal at para. 21.

- (a) the December 2021 affidavit included only redacted bank statements for the accounts in his name and in the names of CanadaFresh JTI and King;²⁰
- (b) the Notice of Examination served on Mr. Mahal in October 2022 required that he produce at his examination unredacted statements for these accounts, and he was asked to produce them ahead of the examination, all of which he failed to do²¹;
- (c) during his examination on December 19, 2022, Mr. Mahal refused to answer questions regarding the sources of the \$281,600 in cash and funds transferred to Golden Miles²²;
- (d) immediately following the examination, Mr. Mahal produced unredacted versions of the statements attached to his December Affidavit, notwithstanding that these documents had been requested in October 2022²³; and
- (e) Mr. Mahal has maintained his refusal to answer questions regarding the sources of the \$281,600 in cash and funds transferred to Golden Miles.²⁴

24. Given Mr. Mahal's credibility issues generally as detailed by the Receiver, and more specifically his refusal to answer questions regarding the sources of the \$281,600 in cash and funds transferred to Golden Miles, an adverse inference should be drawn against him - namely, that these funds do not constitute loan advances by him to Golden Miles. Absent corroborating evidence,

²⁰ December Affidavit, Tab 1 to the Supplementary Motion Record of Santokh Mahal, Exhibits 2-28.

²¹ Transcript of the Cross-examination of Santokh Mahal dated December 19, 2022 (the "Mahal Transcript"), q. 6, Tab 3 to the Responding Motion Record of Skymark Finance Corporation.

²² Mahal Transcript, qq. 9-10, Tab 3 to the Responding Motion Record of Skymark Finance Corporation.

²³ Email correspondence from George Benchetrit to Lisa Corne dated December 22, 2022 and December 30, 2022, Tab 1B to the Responding Motion Record of Skymark Finance Corporation.

²⁴ Ibid.

these payments are equally consistent with being (among other things) repayments of debt, equity injections, or advances by third parties for their own accounts.

25. Given the issues surrounding Mr. Mahal's credibility, there is a need for corroborating evidence to confirm Mr. Mahal's assertions.

26. Where the evidence of one witness is insufficient to make a particular finding on an issue, corroborating evidence from a second source may overcome the inherent weakness in the evidence from the suspect source.²⁵ The rationale for requiring corroborating evidence in this case, as identified by Supreme Court of Canada in [R. v. Vetrovec](#), is that the Court should "believe the witness has good reason to lie".²⁶

27. Here, Mr. Mahal possesses a significant economic incentive to lie. There is a need for evidence corroborating his assertions, particularly given the numerous claims he has made in this proceeding that he has subsequently withdrawn after being unable to substantiate them or having been presented with evidence to the contrary.

Third Party Advances are Not Indirect Advances by Mahal

28. In support of his secured claim, Mr. Mahal relies on the Promissory Note and the Mahal GSA.²⁷

29. CanadaFresh, JTI and King are not parties to the Promissory Note nor to the Mahal GSA.

²⁵ [Pepe v. State Farm Mutual Automobile Insurance Company](#), 2011 ONCA 341 at para. 15.

²⁶ [R. v. Vetrovec](#), [1982] 1 S.C.R. 811, at p. 826.

²⁷ November Affidavit, at paras. 5-6, Tab 1 to the Responding and Cross-Motion Record of Santokh Mahal.

30. Apart from his failure to adduce proper evidence of loan advances by any of these parties, Mr. Mahal is requesting that this Court treat their alleged advances as “indirect” debt owed to Mr. Mahal.

31. Mr. Mahal is essentially asking this Court to sanction repayments of amounts allegedly due to his companies directly to himself as shareholder without regard to those companies’ creditors and other stakeholders.

32. Furthermore, Mr. Mahal’s self-serving assertion that debt owed to a corporation is “indirectly” owed to its shareholders is nonsensical. This proposition is not supported by any legal jurisprudence, and ignores basic corporate law and accounting principles.

IV - RELIEF SOUGHT

33. For the reasons set out above, Skymark respectfully requests that this motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2023.



CHAITONS LLP

**Lawyers for Skymark Finance
Corporation**

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Pepe v. State Farm Mutual Automobile Insurance Company*, 2011 ONCA 341](#)
2. [*R. v. Vetrovec*, \[1982\] 1 S.C.R. 811](#)

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CHAITONS LLP

5000 Yonge Street, 10th Floor
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George Benchetrit (LSO #34163H)

Tel: (416) 218-1141
E-mail: george@chaitons.com

Laura Culleton (LSO # 82428R)

Tel: (416) 218-1128
E-mail: laurac@chaitons.com

Lawyers for Skymark Finance Corporation