

**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 THE RECEIVER  
(Security Motion of Santokh Mahal)**

**Returnable January 16, 2023**

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**PART I - OVERVIEW**

1. This Factum is filed by KSV Restructuring Inc., (“**KSV**”) in its capacities as Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of Mahal Venture Capital Inc. (“**Mahal VC**”) and Golden Miles Food Corporation (“**Golden Miles**” and, together with Mahal VC, the “**Companies**”), and as licenced insolvency trustee of the Companies (the “**Trustee**”, and together with the Receiver, the “**Court Officer**”).
2. This Factum is filed in response to the motion by Santokh Mahal (“**Mahal**”) seeking a declaration that his security interest in the personal property of Golden Miles is (a) valid and enforceable, and ranks in priority to any other security interest registered under the *Personal Property Security Act* (Ontario) (the “**PPSA**”) and (b) secures repayment of principal advances in the amount of \$2,182,914 (the “**Advances**”), plus interest and costs (the “**Mahal Security Motion**”).
3. The Court Officer opposes the relief sought.

4. In the Court Officer's view, the Advances do not constitute a valid secured debt claim because a significant majority of the Advances were made by parties other than Mahal, to whom Golden Miles did not grant security. The Advances are not "indirect" debts owing to Mahal, and are not secured by Golden Miles' grant of security to him.

5. There is insufficient contractual evidence for the Receiver or Trustee to conclude that any of the Advances are valid debt, especially taking into account the Golden Miles financial statements, which are materially inconsistent with Mahal's claims. To the extent that the absence of contractual support and inconsistent financial reporting could be cured by Mahal's claim that he "intended" the Advances to be secured debt, the Receiver is unable to accept Mahal's statements, due to a pattern of deceptive, misleading and misrepresentative statements, actions and sworn testimony by Mahal to the Receiver and this Court.

6. In addition, while it is not necessary for the Court to characterize the Advances as equity in order to dismiss the Mahal Security Motion, the Advances also satisfy the criteria for equity contributions set out in the jurisprudence. The motion should be dismissed on that basis alone.

7. Accordingly, the Court Officer recommends that the Mahal Security Motion be dismissed, with costs.

## **PART II - FACTS**

### **Background on These Proceedings**

8. KSV was appointed Receiver of the Companies pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "Court") made on October 1, 2021.<sup>1</sup> The

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<sup>1</sup> Fourth Report of the Receiver and First Report of the Trustee, dated November 1, 2022 ("Fourth Report") at para 1.0(3).

application to appoint the Receiver was made by Skymark Finance Corporation (“**Skymark**”), which was owed approximately \$29.5 million as of the date of the Receiver’s appointment.

9. On November 15, 2021, the Receiver filed an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act* (the “**BIA**”) on behalf of the Companies, and KSV was appointed Trustee.<sup>2</sup>

10. On April 11, 2022, the Court granted an order in these proceedings approving the sale of substantially all of the Companies’ property to a company wholly owned and controlled by Mahal.<sup>3</sup> The transaction closed on May 18, 2022, resulting in proceeds of \$18.47 million. Of these proceeds, \$2.47 million was allocated to the personal property owned by Golden Miles (the “**Personal Property Proceeds**”).

#### **Background on the Mahal Security Motion**

11. On November 21, 2021, Mahal commenced the Mahal Security Motion seeking, among other things, a declaration that the security in his favour over all of the personal property of Golden Miles, other than inventory, is valid and enforceable, and ranks in priority to any other security interest registered under the PPSA.<sup>4</sup>

12. The basis for Mahal’s secured claim is a general security agreement dated December 14, 2020 granted by Golden Miles to Mahal (the “**Mahal GSA**”). The Mahal GSA is executed by Mahal, on behalf of Golden Miles.<sup>5</sup>

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<sup>2</sup> Fourth Report at para 1.0(4).

<sup>3</sup> Fourth Report at para 2.0(2) and (3)

<sup>4</sup> Fourth Report at para 3.0(1).

<sup>5</sup> Fourth Report at para 3.0(2).

13. The Mahal Security Motion is based on indebtedness under a promissory note dated December 14, 2020 granted by Golden Miles to Mahal (the “**Promissory Note**”), which like the Mahal GSA, is executed by Mahal, on behalf of Golden Miles.<sup>6</sup>

14. The Promissory Note scheduled advances made between March 18, 2016 and October 20, 2020, in the aggregate amount of \$24,101,776.<sup>7</sup> The indebtedness in respect of which Mahal sought a declaration of secured status was (in November 2021) in the amount of CA\$3,183,305 and US\$328,000, all of which was purported to have been advanced after December 15, 2020 (the date of the Mahal GSA), but none of which was recorded in the schedule to the Promissory Note.<sup>8</sup>

15. On December 17, 2021, Mahal filed a supplementary record further limiting his claim to advances in the amount of CA\$2,182,915, based on bank statements showing funds being advanced by Mahal, as well as funds advanced by corporations controlled by Mahal, to Golden Miles, summarized as follows:<sup>9</sup>

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

16. CanadaFresh Corporation, J.T. International Inc. and King MSP are collectively referred to as the “**Mahal Corporations**”.

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<sup>6</sup> Affidavit of Santokh Mahal, sworn November 21, 2021, paragraph 5 (“On December 14, 2020, Golden Miles executed a promissory note in my favour, which evidences the amounts advanced under the Loan”), and Exhibit A

<sup>7</sup> Ibid.

<sup>8</sup> Fourth Report at para 3.0(3)

<sup>9</sup> Fourth Report, at para 3.0(4)-(6).

17. After discussions among the Receiver, Mahal and Skymark, and service of additional motion and application records, the Court Officer provided counsel to Mahal and Skymark with a draft of the Fourth Report<sup>10</sup> on October 17, 2022.<sup>11</sup>

18. In the Fourth Report, the Court Officer takes the position that while Mahal's security, to the extent it secures valid indebtedness incurred after the granting of the Mahal GSA, is valid, enforceable and ranks in priority to the other registered personal property creditors of Golden Miles, Mahal's secured claim should be accepted at an amount less than \$2,182,914 because:

- (a) the Promissory Note did not record any of the debt being claimed as secured;
- (b) the significant majority of the indebtedness claimed by Mahal as being secured was advanced by companies not party to the Mahal GSA;
- (c) the indebtedness set out in the Promissory Note is materially contradicted by the financial statements that had been provided to the Receiver; and
- (d) given the foregoing, the Receiver was being asked to accept Mahal at his word that the advances were secured debt, and the Receiver had serious concerns about Mahal's credibility.

19. Following delivery of the draft Fourth Report, Mahal served a supplementary reply motion record on October 24, 2022, which included a "continuation of the Schedule of Advances to the Promissory Note" that scheduled advances purported to have been made under the Promissory

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<sup>10</sup> The Fourth Report to Court of KSV Restructuring Inc. as Receiver and Manager of Mahal Venture Capital Inc. and Golden Miles Food Corporation and the First Report to Court of KSV Restructuring Inc. as Licenced Insolvency Trustee of Golden Miles Food Corporation, dated November 1, 2022 (the "**Fourth Report**").

<sup>11</sup> The Fourth Report was provided in draft because the Receiver was attempting to formalize certain issues unrelated to the Mahal Security Motion, to be reported on in the same report. These issues were not ultimately resolved, and the Fourth Report was served and filed, unamended from the draft provided on October 17, 2022 as it relates to the Mahal Security Motion, on November 1, 2022.

Note between December 18, 2020 and September 15, 2021. Each advance was endorsed by “SM”, which the Court Officer understands to be Mahal’s initials.<sup>12</sup>

20. Three days later, on October 27, 2022, a further supplemental reply motion record was served, which included, among other things, documents purporting to be unaudited financial statements for Golden Miles for the year ended June 30, 2021 and the three month period ended September 30, 2021 (the “**2021 Financial Statements**”).<sup>13</sup> The 2021 Financial Statements are signed by Mahal, as director.<sup>14</sup>

*The Interest of Golden Miles’ Other Creditors*

21. If the Mahal Security Motion is unsuccessful and Mahal’s secured claim fails, then at least some of the Personal Property Proceeds are not subject to any security interest and, as unencumbered proceeds, are available for distribution to the unsecured creditors of Golden Miles. Based on the statement of affairs filed in the Golden Miles bankruptcy, and subject to the Trustee completing a claims process, the unsecured creditors of Golden Miles (other than Mahal) are owed in excess of \$14 million.

**PART III - ISSUES**

22. This Factum addresses the following issues:

- (a) Does Mahal have a valid secured claim?
  - (i) Is there sufficient contractual evidence of a secured claim?
  - (ii) Do the circumstances and evidence establish a valid secured claim?

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<sup>12</sup> Affidavit of Santokh Mahal, sworn October 24, 2022 (the “**October 24<sup>th</sup> Affidavit**”), Exhibit A.

<sup>13</sup> Supplement to the Fourth Report, at para 2.0(5).

<sup>14</sup> Supplement to the Fourth Report, at para 2.0(7)(d)(ii).

- (iii) Should Mahal's indebtedness be characterized as equity?
- (b) Is the Court Officer acting properly by opposing Mahal's secured claim?
- (c) Should costs be awarded in favour of the Court Officer?.

23. For the reasons that follow, the Court Officer submits that (a) Mahal does not have a valid secured claim,<sup>15</sup> (b) the Court Officer is not only appropriately opposing Mahal's secured claim, but its mandate requires it to do so, and (c) it is appropriate for costs to be ordered in favour of the Court Officer under the circumstances.

#### **PART IV - THE LAW AND DISCUSSION**

24. It is critical on this motion to properly articulate the relief being sought.

25. Mahal's original November 21, 2021 notice of motion sought only a declaration that his security was valid, enforceable and in first priority. The Court Officer is satisfied that the Mahal GSA creates a valid security interest, that this security interest has been properly perfected by registration, and that by virtue of the date of the registration, the security ranks in priority to Golden Miles' other secured creditors.<sup>16</sup>

26. However, materials filed by Mahal after the service of his notice of motion have added a request for a declaration that his security secures indebtedness in the amount of \$2,182,914. This is the relief that the Court Officer opposes. While the Mahal security is valid, it does not secure a valid debt owing by Golden Miles to Mahal.

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<sup>15</sup> The Receiver has advised in the Fourth Report that Mahal may have a claim in the amount of \$281,600, however the Receiver has not yet made a final determination on this matter. As discussed herein and in the Fourth Report, it is open to the Court to determine that Mahal has a valid secured claim in the amount of \$281,600.

<sup>16</sup> Mahal's security is subordinate to the interest of the Bank of Nova Scotia in respect of certain insurance proceeds that are not at issue in the Mahal Security Motion, and Court Officer understands that this is not disputed by Mahal.



**A. Mahal Does Not Have a Valid Secured Claim**

27. The Court Officer opposes Mahal's secured claim for four reasons:

- (a) The Promissory Note purports to be "conclusive evidence of the amount of [Golden Mile's] liability to [Mahal]", but did not evidence any of the \$2,182,914 claimed by Mahal in the Mahal Security Motion until a self-serving updated schedule to the Promissory Note was filed on October 24, 2022.
- (b) Based on Mahal's own evidence, \$1,901,314 of the \$2,182,914 claimed by Mahal was "loaned" not by Mahal, but rather by parties to which Golden Miles did not grant a security interest.
- (c) The financial statements of Golden Miles, which are based on financial information provided by Mahal to his accountants, contradict the secured debt claim.
- (d) Given the absent and conflicting evidence of a debt, the Receiver, the Trustee and the Court are being asked to accept Mahal's word that there is a secured debt, and the Court Officer has material, well-founded and documented concerns about Mahal's credibility.

**(i) Onus of Proof**

28. The onus to prove the validity and amount of a creditor's indebtedness is on the creditor.<sup>17</sup>

29. Contrary to the position taken in the Mahal factum, the Court Officer has never alleged that Mahal's secured debt is equity – only that the secured claim is not valid. Neither the Receiver nor the Trustee have run a claims process.<sup>18</sup> Mahal has never filed a proof of claim. Neither the

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<sup>17</sup> *Re U.S. Steel Ltd.*, 2016 ONSC 569, at para 141.

<sup>18</sup> The Trustee provided standard reporting and proof of claims forms to creditors at the Golden Miles first meeting of creditors, but no claims process, claims bar date or call for claims has ever occurred.

Receiver nor the Trustee have disallowed Mahal's secured claim, nor commenced a motion regarding such claim. Mahal commenced the Mahal Security Motion; the Receiver and the Trustee are simply responding to it. The onus of proof is on him.

(ii) **The Promissory Note Does Not Create Evidence of the Relevant Indebtedness**

30. The Promissory Note provides, in part (emphasis added):

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.

31. By its own terms, the Promissory Note (a) creates evidence of Golden Miles' indebtedness to Mahal from time to time, and (b) is "conclusive evidence" of the amount of such debt.

32. Notwithstanding the foregoing, the Promissory Note that was served and filed in connection with the Mahal Security Motion did not evidence any of the indebtedness claimed. Mahal's position on this omission is that "it was not [his] practice to complete a contemporaneous schedule of advances, and [he] was not accustomed to endorsing the advances [he] made to Golden Miles after December 14, 2020 on the schedule to the Promissory Note."<sup>19</sup> That may be, but when debt claims are competing with the valid debt claims of other creditors, details matter.

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<sup>19</sup> October 24 Affidavit, at para. 10.

33. Mahal's factum relies extensively on the decisions in *US Steel* and *Maisonneuve et al. v. Langlois et al.* for the proposition that contractual evidence of indebtedness is not determinative of the existence of such debt. These decisions are not applicable to this analysis.

34. The question for the Court in *US Steel* was whether certain related party advances ought to be characterized as debt or equity. The question for the Court in *Maisonneuve* was whether a solicitor was negligent for failing to prepare a promissory note to evidence advances under a loan. In both cases, the Court concluded that a promissory note or credit agreement was not required to prove a debt. These decisions have no bearing on the Receiver and the Trustee's conclusions.

35. In the present case, there is a promissory note, and that promissory note purports to be "conclusive evidence" of the quantum of the indebtedness owing by Golden Miles to Mahal. None of the indebtedness claimed in the Mahal Security Motion was recorded in the Promissory Note until the supplementary schedule was provided, 11 months after the Mahal Security Motion was commenced, and 11 months after Golden Miles was bankrupt.

**(iii) Advances by Third Parties Are Not Secured by the Mahal GSA**

36. Mahal's failure to record the relevant indebtedness in the Promissory Note may be remedied by the prevailing circumstances and the evidence of advances by Mahal to Golden Miles, for the reasons set out in *US Steel* and *Maisonneuve*. In the Court Officer's view, 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 Mahal GSA. This is consistent with findings in the Fourth Report.<sup>20</sup>

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<sup>20</sup> Fourth Report, at para. 3.1(15)

37. However, no such remedy is available for the \$1,901,314 advanced to Golden Miles by parties other than Mahal.

*No “Indirect” Debt*

38. Mahal takes the position that \$1,901,314 of advances made to Golden Miles by the Mahal Corporations constitute indebtedness of Golden Miles owing to Mahal, and that this indebtedness is secured by the Mahal GSA, to which none of these advancing Mahal Corporations are parties.

39. Mahal relies entirely on the use of the word “indirect” in the Mahal GSA, and argues that indebtedness owing by Golden Miles to the Mahal Corporations is indebtedness owing “indirectly” to Mahal.

40. At the heart of Mahal’s position is a fundamental error about the nature of the obligations among the parties. A debt owing by a borrower to a corporation is not a debt owing “indirectly” to the shareholders of that corporation, because a shareholder’s interest in accounts receivable of the corporation is not a debt claim. Shareholders are entitled to the residual equity value of a corporation after all creditors have been paid.

41. In the present case, Mahal’s interest in debt owing by Golden Miles to a Mahal Corporation is an equity interest in the residual value of that receivable, after all creditors of the corporation have been paid. It is not an “indirect” debt claim; it is not a debt claim at all.

42. Moreover, the term “indirect” is not superfluous or meaningless, as used in the Mahal GSA, it just does not describe the Advances. A guarantee obligation, for example, could be considered indirect, in so far as it does not crystalize as debt until the guaranteed obligation is in default.

*“All Obligations Clauses”*

43. The Court Officer has been unable to find case law to support Mahal’s claim that indebtedness owing by a borrower to a corporation constitutes indebtedness of that borrower to that corporation’s shareholder, and no case law to support the proposition that indebtedness owing by a borrower to a corporation can be secured by a security interest granted by the borrower to that corporation’s shareholder. Mahal’s factum offers no such case law either.

44. Given the absence of case law on point, the jurisprudence and academic commentary on “all obligations clauses” are analogous and instructive.

45. “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 were incurred. Such clauses become subject to scrutiny by the Courts when secured creditors purchase third party debt from other creditors, and then assert that such purchased debt is secured.

46. While there is a dearth of Canadian case law on the subject, courts internationally have been critical of “all obligations clauses” and their purported ability to convert unsecured claims to secured claims. The textbook *Personal Property Security Law* (3rd ed, 2022, Irwin Law) notes:

Courts are reluctant to interpret “all obligations” clauses in security agreements as covering debts to third parties for two reasons. The first involves a concern about unfairness to the debtor. It is unlikely that the debtor contemplates that the security interest will cover obligations assigned by third parties to the secured party... The second concern is that this practice would have the potential to disrupt the equitable distribution of assets on an insolvency of the debtor. This was expressed in the US decision of *In Re EA Fretz Company, Inc.*:

If a senior secured party to a security agreement could, via post-bankruptcy assignment, secure and perfect under the umbrella of prior omnibus arrangements the claims of subsidiaries and strangers (general or unperfected secured creditors), the potential for inequality, and, indeed collusion or fraud, would be enormous. Sanctioning such transactions would truly create “strangers in paradise” violative of a cardinal principle of bankruptcy law. [emphasis added]

47. Professor Roderick Wood adds:<sup>21</sup>

Although the courts have regarded future advances clauses as a legitimate and necessary aspect of modern financing practice, judicial tolerance is pressed to the limit when a secured party attempts to secure more distant claims. In particular, judges have cast a jaundiced eye upon the secured party who buys up the claims of other unsecured claimants and then argues that the assigned claims have thereby been converted into secured claims by virtue of the wide language contained in an all obligations clause. [Emphasis added]

48. The leading Canadian case on “all obligations clauses” is the Saskatchewan Court of Appeal decision in *CPC Networks Corp. v. Eagle Eye Investments Inc.*,<sup>22</sup> in which CPC granted a GSA to a bank to secure the bank’s interest, which included an “all obligations clause”. The bank then assigned the GSA to Eagle Eye, a company that had a separate unsecured claim against CPC. Eagle Eye proceeded to claim that the assigned GSA made its unsecured claim a secured claim.

49. The Saskatchewan Court of Appeal ruled that it could not have been the intention of the parties to allow the GSA to turn an unsecured claim into a secured one through assignment of the GSA, concluding “it is a stretch to assume, without clear words that a financial institution and the debtor intend that an “all obligations” clause secures, upon assignment, the debtor's unsecured debts to the assignee.”<sup>23</sup>

50. The Court’s decision in *CPC* turns on the objective intention of the parties. In the present case, the Court Officer submits that no party could objectively conclude that the parties to the Mahal GSA (which, it bears repeating, was signed on behalf of Golden Miles by Mahal himself), could have intended by the use of the term “indirect” to secure obligations owing by Golden Miles

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<sup>21</sup> Turning Lead into Gold: The Uncertain Alchemy of “All Obligations” Clauses (2004) 41 Alta L Rev 801-823, [2004 CanLII Docs 165](#).

<sup>22</sup> *CPC Networks v Eagle Eye Investments Inc.*, [2012 SKCA 118](#) [CPC].

<sup>23</sup> *CPC*, *supra* at para 38.

to the Mahal Corporations, which Mahal Corporations are nowhere referred to or contemplated by the Mahal GSA.

*Alternatives Available to Mahal and His Companies*

51. Had Mahal and Golden Miles intended for advances made to Golden Miles by the Mahal Corporations to be secured by the Mahal GSA, there are several ways to express that intention:

- (a) The Mahal Corporations could have been named as secured parties in the Mahal GSA, and registered against Golden Miles under the PPSA;
- (b) Golden Miles could have issued a promissory note and security to the Mahal Corporations;
- (c) The Mahal Corporations could have made advances to Mahal, who then loaned those advances to Golden Miles as direct indebtedness between Mahal and Golden Miles.

52. Golden Miles and Mahal did none of these things, and did not structure the Promissory Note or the Mahal GSA in a way that would give the Mahal Corporations a secured claim against Golden Miles. It would accordingly be inequitable, and highly prejudicial to the creditors of Golden Miles, to infer a self-serving intention to make non-parties to the Mahal GSA secured creditors under it.

53. As Justice Romaine observed in the context of a debt recharacterization case: “Business choices on structure, while otherwise entirely proper, can have consequences for characterization.”<sup>24</sup> So too here.

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<sup>24</sup> *Alberta Energy Regulator v Lexin Resources Ltd*, [2018 ABQB 590](#) at para 53.

(iv) **Golden Miles Financial Statements**

54. The Receiver has reported that the books and records of Golden Miles are extremely deficient. The limited financial information and reporting that has been made available to the Receiver, prepared by or at the direction of Mahal, is unreliable and inconsistent, but even this poor financial reporting does not support Mahal's position that he has a secured claim.

*2020 Financial Statements Fundamentally Contradict Promissory Note Schedule*

55. The indebtedness set out in the Promissory Note schedule is materially contradicted by the financial statements that were provided to the Receiver for the periods before December 2020. While the indebtedness reported (or not reported) in these financial statements is not the subject of this motion (because Mahal has limited his claim to advances made after December 2021), the Court Officer believes that it is noteworthy that the financial statements are not consistent with the Promissory Note schedule.

56. The Receiver was provided with two sets of financial statements for Golden Miles:

- (a) audited financial statements for the period ending October 30, 2020 (the "**2020 Audited Financials**"), prepared by Golden Miles' accountant "on the basis of information provided by management", and
- (b) a review engagement report dated as of June 20, 2020 (the "**2020 Unaudited Financials**"), together with the 2020 Audited Financials, the "**2020 Financials**"), signed by Golden Miles' accountants, Gill & Co., and subject to the caveat that "Management is responsible for the preparation and fair presentation of these financial statements in accordance with Canadian accounting standards for private enterprises, and for such internal control as management determines is necessary to



enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error”.

“Management”, referred to in connection with both sets of financials, is Mahal.

57. The 2020 Financials, prepared based on information provided by Mahal, and the grid of indebtedness attached to the Promissory Note, prepared by Mahal himself, are fundamentally inconsistent. The Promissory Note grid and the balance sheet in the 2020 Financials reflect the following:

	<b>Per 2020 Unaudited Financials</b>	<b>Per 2020 Audited Financials</b>	<b>Per Promissory Note grid</b>
June 30, 2019 “Due to Shareholder”	\$8,453,255	Not reported	\$22,703,836.27
June 30, 2020 “Due to Shareholder”	\$7,186,603	\$0	\$23,028,276.47

58. The 2020 Financials include other transparent errors, including listing Mahal VC debt as Golden Miles debt, which is outlined in detail in the Fourth Report.

59. As stated above, the indebtedness for the period covered by the 2020 Financials is not the subject of the Mahal Security Motion. However, because the 2020 Financials are fundamentally irreconcilable with the Promissory Note, the Receiver is unable to give any weight to the 2020 Financials, the Promissory Note schedule or the financial information provided by Mahal.

*2021 Financial Statements Are Not Credible*

60. On October 26, 2022, after the delivery of the Fourth Report to Mahal, additional financial information was served on the Receiver and Trustee by Mahal, including unaudited financial

statements for Golden Miles for the year ended June 30, 2021 and the three months ended September 30, 2021 (defined above as the “2021 Financial Statements”).

61. The Receiver’s concerns about these documents are set out in the Supplement to the Fourth Report, together with letters sent by the Receiver to Mahal and Gill & Co. requesting clarification, and Mahal’s responses to those questions. Gill & Co. did not respond to the Receiver’s inquiries.

62. Specifically, the Receiver notes that the 2021 Financial Statements were prepared by Gill & Co. at Mahal’s request in September 2022,<sup>25</sup> based solely on the information in Mahal’s motion records and correspondence by telephone,<sup>26</sup> and have been signed-off by Mahal as “Director”. Mahal’s explanation for why he had the 2021 Financial Statements prepared is that he needed financial statements to collect tax refunds following his acquisition of the Golden Miles assets in the Transaction, and “was not able to confirm that KSV had arranged for the preparation of Golden Miles’ financial statements and tax returns prior to the filing deadline.”

63. The Court Officer does not accept any of these explanations or give any weight to the 2021 Financial Statements, including because:

- (a) Golden Miles has been bankrupt since November 15, 2021, which among other things means that Mahal had no authority to requisition or sign-off on the 2021 Financial Statements;
- (b) The Receiver is not aware of what information other than what is in Mahal’s motion records was provided to Gill & Co. in the context of Mahal instructing them to prepare the statements; and

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<sup>25</sup> November 24, 2022 letter from Dickinson Wright, Supplement to the Fourth Report, Appendix “C”, at para. 4.

<sup>26</sup> *ibid*, at para. 6.

(c) Gill & Co. was informed by the Receiver on June 1, 2022 that the Receiver had filed “nil” tax returns for Golden Miles during the relevant period.

(v) **Mahal’s Credibility**

64. Given the absent and conflicting documentary evidence, the Court Officer’s concerns about Mahal’s credibility are entirely germane to the Mahal Security Motion, and to the Court Officer’s position that it ought to be dismissed. The Court Officer is being asked to take Mahal at his word. The Court Officer does not.

65. As outlined in detail in the Fourth Report, Mahal has filed affidavit evidence in these proceedings that understated the documented, verifiable indebtedness of the Companies by approximately \$10 million, or 30%; this is not a matter of “legitimate questions raised by Mahal”, as he claims.<sup>27</sup> He failed to cooperate with the Receiver, forcing the Receiver to bring a motion for disclosure and compliance.<sup>28</sup> He has made patently false or incredulous statements to the Receiver.<sup>29</sup> He has attempted, through sworn affidavit evidence, to enforce a sham trust in connection with which the Trustee obtained an expert opinion that “there is conclusive evidence” that his signature on critical documentation was not, in fact, his.<sup>30</sup>

66. Mr. Mahal’s repeated attempts to deceive or mislead the Court Officer are directly connected to his position that the secured indebtedness claimed by him in the Mahal Security Motion is valid because he intended it to be valid. The attempts are also fatal to it.

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<sup>27</sup> Mahal Factum at para 17(a)

<sup>28</sup> Fourth Report at para 27(b)

<sup>29</sup> Fourth Report at para 27(c)

<sup>30</sup> Fourth Report at para 27(d) and, for additional detail, First Report to Court of KSV Restructuring Inc. as licenced Trustee of Mahal Venture Capital Inc., dated February 22, 2022.

(vi) **Equity Characterization**

67. Mahal’s factum argues that the Advances should not be characterized as equity. The Fourth Report does not take the position that the Advances are equity. The Court Officer’s position in the Fourth Report is considerably simpler: the Advances are not valid secured debt, because there is insufficient evidence of indebtedness, and the Advances were primarily made by corporations that are not party to the Mahal GSA.

68. The Court need not undertake a debt characterization analysis in order to dismiss the Mahal Security Motion. However, in the Court Officer’s view, if the analysis undertaken by Justice Wilton-Siegel in *US Steel* were to be applied to the present facts, there is ample reason to conclude that the Advances are, in fact, equity.

69. The Court in *US Steel* sets out a two part test to be followed in cases of debt characterization: (a) subjectively, did the alleged lender actually expect to be repaid the principle amount of the loan with interest out of the cashflows of the alleged borrower, and (b) objectively, was the expectation reasonable under the circumstances?<sup>31</sup>

70. To satisfy the “subjective expectation” element of the test, Mahal relies on the projected income statement attached to his October 26, 2022 affidavit (the “**Projections**”) as evidence that the Golden Miles flour mill “would generate significant revenue during the first 2 years.”<sup>32</sup>

71. The Projections reference a business generating revenue in the first year that exceeds \$340 million and earnings before taxes that exceed \$133 million. No underlying assumptions are

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<sup>31</sup> *Re U.S. Steel Ltd.*, 2016 ONSC 569, at paras 186-190.

<sup>32</sup> Mahal factum, at para 33.

referenced, nor are supporting documents included.<sup>33</sup> Mahal did not answer the Receiver's request for clarification on the underlying assumptions, nor provide supporting documents or information about who prepared the supporting documents.<sup>34</sup>

72. The Projections were prepared by Golden Miles' accountant when, according to Mahal himself, the flour mill was "in dire financial circumstances", "had been unable to commence operations" and "did not have sufficient funding to complete the steps required to obtain an operating permit from the City of Brantford". These descriptions remained accurate when the Receiver was appointed – the Companies had no liquidity and the flour mill was not operational, nor was it close to being operational.<sup>35</sup>

73. Whatever Mahal's subjective belief, it is simply beyond any reasonable standard to objectively believe the conclusions in the Projections. On this basis, in the Court Officer's view, Mahal's debt claim does not satisfy the *US Steel* test.

74. Beyond the two-part test in *US Steel*, a number of other factors exist in the present case that are identified by Justice Wilton-Siegel as indicia of debt being equity, including:

- (a) the Promissory Note provides for interest to be paid "from time to time at the rate as is agreed between the Borrower and the Lender until payment in full";<sup>36</sup>

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<sup>33</sup> Supplement to the Fourth Report at Section 2.0(7)(a)

<sup>34</sup> November 11, 2022 letter from Blakes to Dickinson Wright and November 24, 2022 letter from Dickinson Wright, Supplement to the Fourth Report, Appendix "B" and "C".

<sup>35</sup> Supplement to the Fourth Report at Section 2.0(7)(b)

<sup>36</sup> Fourth Report at Section 2.0(6)

- (b) the Promissory Note has no repayment obligations other than upon insolvency of Golden Miles, no maturity date, no schedule of payments, and no provision for the lender to demand payment;<sup>37</sup> and
- (c) the Promissory Note does not record any repayments being made, going back to March 18, 2016.<sup>38</sup>

75. It bears repeating that it is not necessary for this Court to find that the Advances are equity in order to dismiss the Mahal Security Motion. However, in the Court Officer's view, the indebtedness claimed by Mahal does not satisfy the two-part test to establish indebtedness in *US Steel*, and several important indicia of equity are present. There are therefore sufficient grounds for the Court to conclude that the Advances are equity.

**B. The Receiver And Trustee Are Appropriately Opposing Mahal's Secured Claim**

76. Mahal's factum takes the position that the Receiver and the Trustee are acting in a biased, impartial and inappropriate manner by opposing his secured debt claim, and that the "attack" properly lies in the mouth of Skymark.

77. There is no attack. The Receiver and Trustee are simply responding to a motion brought by Mahal for a declaration that he has a secured claim which in the Receiver's and Trustee's considered and well documented opinion is invalid.

78. If the Mahal Security Motion is denied, at least some of the Personal Property Proceeds will be unencumbered and available for distribution to Golden Miles' unsecured creditors. The

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<sup>37</sup> Fourth Report at Section 2.0(9).

<sup>38</sup> The Court Officer notes that the "shareholder schedule" attached to the October 24<sup>th</sup> Affidavit records a handful of disbursements to Mahal.

resolution of the Mahal Security Motion is accordingly relevant to Golden Miles' unsecured creditors, and it is therefore entirely appropriate for the Trustee to respond.

79. It is well established in Ontario that court-appointed receivers and trustees owe a fiduciary duty to all interested stakeholders of a debtor. Receivers and trustees must also act impartially to represent the interests of all creditors.<sup>39</sup>

80. In *Ravelston*, Justice Cumming laid out the general duties of a court-appointed receiver:

62 It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagara Helicopters Ltd.*

67 A court-appointed receiver under the BIA or CJA, as with a trustee in bankruptcy under the BIA, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty.

81. Justice Gilmore of the Ontario Superior Court of Justice recently stated that “it is presumed that Receivers will act impartially”, adding that impartiality does not prevent a receiver from “taking a position which may favour certain stakeholders over others”.<sup>40</sup>

82. Courts should be reluctant to second guess the business decisions of a receiver.<sup>41</sup> In the context of a Receiver's adjudication of claims, a court's review of a court-established claims process must be conducted on a principled basis and not “trample on the integrity of the claims

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<sup>39</sup> *Ravelston Corp. Re*, [29 CBR \(5<sup>th</sup>\) 1, 155 ACWS \(3d\) 258](#) (Ont SCJ) [*Ravelston*] at para 67; *Montor Business Corp (Trustee of) v Goldfinger*, [2011 ONSC 2044](#) at para 10; *Smoljan (Bankruptcy Trustee of) v Musiala*, [2019 ONSC 6776](#) at para 58; and *Illidge (Trustee of) v St. James Securities Inc.*, [34 CBR \(4<sup>th</sup>\) 227, 60 OR \(3d\) 155](#) (Ont CA) at para 10, citing *Federal Trust Co v Frisina (1976)*, [20 O.R. \(2d\) 32, 86 DLR \(3d\) 591](#) (Ont HC)

<sup>40</sup> *Stevens et al v Hutchens et al*, [2021 ONSC 3255](#) at para 4.

<sup>41</sup> *Stanbarr Services Ltd v Reichert*, [2014 ONSC 6435](#) [*Stanbarr*] at para 7.

process”.<sup>42</sup> Courts should assume that a “receiver is acting properly unless the contrary is clearly shown”.<sup>43</sup>

83. While receivers owe a duty to all stakeholders to act fairly and impartially, that does not mean that they lose their neutrality upon recommending an action that is unfavourable to one stakeholder.<sup>44</sup>

The fact that a receiver recommends a course of action does not mean that it has lost its neutrality. The Receiver has a duty to exercise its judgment under the mandate given to it by the Receivership Order and to make recommendations to the court. Provided that the Receiver has acted reasonably, prudently and fairly, its decision should be given deference. [Emphasis added]

84. In the context of a formal claims process, which is analogous to but not the same as the Receiver’s position on the Mahal Security Motion, courts should be loathe to overturn a receiver’s decision to disallow a claim and should only do so if the receiver “committed an error of law or a palpable and overriding error of fact in disallowing the Claimants’ claim”.<sup>45</sup> The onus should be placed on the claimants to demonstrate that a receiver’s decision is incorrect.<sup>46</sup>

85. Trustees have a duty under s 135 of the BIA to examine every claim and the grounds it is based on. During this process, the trustee has an obligation to take into account the effects upon other creditors.<sup>47</sup>

86. Accordingly, the Receiver and the Trustee are not only acting properly in opposing the Mahal Security Motion, they are explicitly carrying out their mandates as Court-appointed officers.

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<sup>42</sup> *Comfort Capital Inc v Canada Investment Corporation*, [2019 ONSC 5303](#) [*Comfort Capital*] at para 22.

<sup>43</sup> *Stanbarr*, *supra*, at para 7.

<sup>44</sup> *24031777 Ontario Inc v Bending Lake Iron Group Ltd*, [2016 ONSC 199](#) at paras 102-103.

<sup>45</sup> *Ontario Securities Commission v Paramount Equity Financial Corporation et al*, [2018 ONSC 5327](#) [*Paramount*] at paras 29-35.

<sup>46</sup> *Paramount*, *supra* at para 35; *Comfort Capital*, *supra* at para 22; and *DBDC Spadina Ltd v Walton*, [2015 ONSC 5608](#) at para 2.

<sup>47</sup> *CIBC v 433616 Ontario Inc*, 17 CBR (3d) 160, 38 ACWS (3d) 1086 (Ont CJ Gen Div) [*CIBC*] at para 16.



## **PART V - COSTS**

87. In the Receiver's view, this motion is an appropriate case for costs to be awarded against Mahal, on a substantial indemnity basis, if the Mahal Security Motion results in a declaration that he has no secured claim, or that his secured claim is valued at \$281,600 (which amount the Receiver has stated in the Fourth Report could be valid).

88. Mahal unilaterally brought the Mahal Security Motion less than two months after the receivership proceedings commenced, and 6 days after Golden Miles was adjudicated bankrupt. Neither the Receiver nor the Trustee had commenced a claims process, and the Receiver and Trustee are not clear on why a motion was necessary.

89. The Mahal Security Motion has required the Court Officer to incur material costs on a matter that could properly have been dealt with at first instance in a claims process. Mahal has filed and served 5 motion records in this matter, and filed the 2021 Financial Statements (which he had no authority to cause to be prepared) almost a year after the Mahal Security Motion was commenced.

90. In the Court Officer's view, Mahal's factum inappropriately makes serious and unsustainable allegations against the conduct and impartiality of the Court Officer for undertaking its duty to assess and determine the validity of a claim by one creditor, in the interests of all of the other creditors. The creditors of the Golden Mile estate should not be required to bear the cost of the Court Officer responding to these allegations.

91. As Justice Newbould has stated, “to make reckless allegations with respect to the integrity of a court-officer occupying a position of public trust is a serious matter,”<sup>48</sup> and is grounds to entitle a trustee and receiver to costs on a substantial indemnity basis.

92. For the same reasons that the Court Officer believes that costs in its favour are warranted, the Court Officer submits that an award of costs against the Receiver or the Golden Miles estate would be inappropriate, even if the Mahal Security Motion is successful.

#### **PART VI - CONCLUSION**

93. For the reasons set out above, the Court Officer respectfully requests that this Court dismiss the Mahal Security Motion, with costs.

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



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Chris Burr  
Lawyers for the Receiver and the Trustee

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<sup>48</sup> *Kaptor Financial Inc. v. SF Partnership, LLP*, [2016 ONSC 6607](#), at para. 7

## SCHEDULE “A”

### LIST OF AUTHORITIES

<u>Case</u>	
1.	<i>U.S. Steel Canada Inc (Re)</i> , <a href="#">2016 ONSC 569</a>
2.	Turning Lead into Gold: The Uncertain Alchemy of “All Obligations” Clauses (2004) 41 Alta L Rev 801-823, <a href="#">2004 CanLIIDocs 165</a> .
3.	<i>CPC Networks v Eagle Eye Investments Inc</i> , <a href="#">2012 SKCA 118</a>
4.	<i>Alberta Energy Regulator v Lexin Resources Ltd</i> , <a href="#">2018 ABQB 590</a>
5.	<i>Ravelston Corp, Re</i> , <a href="#">29 CBR (5<sup>th</sup>) 1</a> , <a href="#">155 ACWS (3d) 258</a> (Ont SCJ)
6.	<i>Montor Business Corp (Trustee of) v Goldfinger</i> , <a href="#">2011 ONSC 2044</a>
7.	<i>Smoljan (Bankruptcy Trustee of) v Musiala</i> , <a href="#">2019 ONSC 6776</a>
8.	<i>Illidge (Trustee of) v St. James Securities Inc</i> , <a href="#">34 CBR (4<sup>th</sup>) 227</a> , <a href="#">60 OR (3d) 155</a> (Ont CA)
9.	<i>Federal Trust Co v Frisina</i> ( <a href="#">1976</a> ), <a href="#">20 O.R. (2d) 32</a> , <a href="#">86 DLR (3d) 591</a> (Ont HC)
10.	<i>Stevens et al v Hutchens et al</i> , <a href="#">2021 ONSC 3255</a>
11.	<i>Stanbarr Services Ltd v Reichert</i> , <a href="#">2014 ONSC 6435</a>
12.	<i>Comfort Capital Inc v Canada Investment Corporation</i> , <a href="#">2019 ONSC 5303</a>
13.	<i>24031777 Ontario Inc v Bending Lake Iron Group Ltd</i> , <a href="#">2016 ONSC 199</a>
14.	<i>Ontario Securities Commission v Paramount Equity Financial Corporation et al</i> , <a href="#">2018 ONSC 5327</a> [ <i>Paramount</i> ]
15.	<i>DBDC Spadina Ltd v Walton</i> , <a href="#">2015 ONSC 5608</a>
16.	<a href="#">CIBC v 433616 Ontario Inc</a> , <a href="#">17 CBR (3d) 160</a> , <a href="#">38 ACWS (3d) 1086</a> (Ont CJ Gen Div)
17.	<i>Kaptor Financial Inc. v. SF Partnership, LLP</i> , <a href="#">2016 ONSC 6607</a>

SKYMARK FINANCE CORPORATION  
Applicant

- and -

MAHAL VENTURE CAPITAL INC., et al.  
Respondents

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

Proceeding Commenced at Toronto

**FACTUM OF THE RECEIVER & TRUSTEE**  
**(Security Motion of Santokh Mahal)**

**Returnable January 16, 2022**

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