

**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
(Motion for Approval of Sale Process and Ancillary Matters)
Returnable November 22, 2021

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PART I - OVERVIEW

1. This Factum is filed by KSV Restructuring Inc., in its capacity as Court-appointed receiver and manager (the “**Receiver**”), appointed pursuant to the Order of the Honourable Mr. Justice McEwen of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) granted on October 1, 2021 (the “**Appointment Order**”), in support of the Receiver’s motion for an order:

- i. approving the proposed sale process (the "**Sale Process**") as described in the Second Report of the Receiver dated November 15, 2021 (the "**Second Report**"), to be commenced immediately;

- ii. amending the Appointment Order to (a) increase the Receiver's borrowing limit from \$500,000 to \$2,000,000, (b) permit the Receiver to incur fees and charges for borrowing, and (c) elevate the priority of the Receiver's Charge and Receiver's Borrowings Charge (both as defined in the Appointment Order) above the charges of three secured creditors of the Companies in respect of which the Receiver's Charge and Receiver's Borrowings Charge are currently subordinate;
- iii. sealing Confidential Appendix "1" (the "**Confidential Appendix**") to the Second Report;
- iv. approving the activities of the Receiver as described in the First Report of the Receiver dated October 20, 2021 (the "**First Report**") and the Second Report; and
- v. granting certain other ancillary relief.

2. The approval of the Sale Process is fair and reasonable, and will enable the Receiver to undertake a comprehensive, transparent and efficient sale process for the Property (as defined below) to maximize value for creditors and achieve closing of potential transaction(s) on an appropriate timeline. Given the significant monthly overhead cost of maintaining the Property, the risk that insurance coverage of the Property may run out in March 2022, and the impending holiday season, it is critical that the Sale Process be commenced as soon as possible. The Sale Process accordingly ought to be approved.

3. The proposed amendments to the Appointment Order are necessary to provide the Receiver with the required funding, and security, to complete its mandate, and therefore ought to be made.

4. The Confidential Appendix contains a commercially sensitive comparison of the funding offers received from interested lenders. The salutary effects of sealing it outweigh any deleterious effects and thus it ought to be sealed.

5. Capitalized terms used but not otherwise defined in this Factum shall have the meanings given to them in the Second Report.

PART II - FACTS

Background

6. Pursuant to the Appointment Order, KSV was appointed as 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**”).

Second Report at para 1.0(1).

7. The principal purpose of the receivership proceedings is to allow the Receiver to take possession, preserve, market and sell the Property to maximize value for the Companies’ creditors.

Second Report at para 1.0(3).

The Sale Process

8. The Sale Process has been prepared by the Receiver, with the objective of obtaining offers for the Property through a thorough and transparent process that is designed to provide the greatest

value to the Companies, and in turn, their creditors. The Sale Process provides for an efficient marketing process which will target prospective purchasers with expertise in the milling industry.

Second Report at paras 4.0(5) and 4.1(1).

9. The proposed Sale Process is anticipated to run for approximately 10 weeks. However, by the terms of the Sale Process, certain deadlines and timelines may be revised by the Receiver.

Second Report at paras 4.0(5) and 4.1(1)(e).

10. As set out in further detail in the Second Report at Paragraph 4.0(5), the key parts of the proposed Sale Process are:

Sale Process		
Milestone	Description of Activities	Estimated Timeline
<i>Phase 1 – Underwriting</i>		
Marketing materials	➤ The Receiver will prepare (a) an interest solicitation letter (“ISL”), (b) a form of non-disclosure agreement (“NDA”); and (c) a virtual data room.	In process
Prospect Identification	➤ The Receiver will prepare a list of prospective purchasers who may be interested in the opportunity (the “Prospective Purchasers”).	
<i>Phase 2 – Marketing</i>		
Interest Solicitation	➤ The Receiver will contact Prospective Purchasers and provide them with the ISL and NDA. An ISL and NDA will also be provided to any party that reasonably requests same.	Weeks 1 –10
Access to Data Room	➤ Upon execution of the NDA, Prospective Purchasers will be provided with access to the data room and other information that becomes available to the Receiver.	
Diligence	➤ Interested parties to conduct diligence, including: <ul style="list-style-type: none"> ○ accessing the information in the data room (including financial information, all critical contracts, designs, drawings, schematics, etc.); ○ attending site tours at the Flour Mill; and ○ attending meetings with former advisors to the Companies, if possible and upon request. 	

Sale Process		
Milestone	Description of Activities	Estimated Timeline
Offer Deadline	<ul style="list-style-type: none"> ➤ Binding offers are to be submitted on or before 4:00 pm (Toronto Time) on January 31, 2022. ➤ Offers shall be submitted by way of a form of asset purchase agreement. 	January 31, 2022
Post-Bidding Negotiation	<ul style="list-style-type: none"> ➤ The Receiver, in its sole discretion, may invite certain parties to participate in further rounds of bidding. The Receiver may also seek to clarify terms of the offers submitted and to negotiate such terms. 	After Offer Deadline
<i>Phase 3 – Offer Review and Negotiations</i>		
Selection of Successful Offer(s)	<ul style="list-style-type: none"> ➤ The Receiver will select the successful bidder, having regards to, among other things: <ul style="list-style-type: none"> ○ Total consideration (cash and assumed liabilities); ○ Form of consideration being offered; ○ Third party approvals required; ○ Conditions (including any financing conditions); ○ Other factors affecting the speed, certainty and ease of closing. ➤ 	Week 11
Sale Approval Motion	<ul style="list-style-type: none"> ➤ Upon selection of the successful offer(s), the Receiver will seek Court approval of the successful offer(s), on not less than 7 calendar days' notice to the service list and registered secured creditors. 	ASAP
Closing	<ul style="list-style-type: none"> ➤ As soon as possible following Court approval. 	ASAP

11. At the conclusion of the Sale Process, the Receiver will make a motion to this Court to obtain approval of any successful bid(s) and one or more vesting orders with respect to the asset purchase agreement(s) with any ultimate successful bidder(s).

Second Report at para 4.0(5).

12. On November 16, 2021, Dickinson Wright LLP (“**Dickinson**”), counsel to Santokh and Jesse Mahal, the sole officer, director and shareholder of Mahal VC and Golden Miles, respectively, requested that the Receiver that Santokh would be seeking an adjournment of the hearing of the Sale Process approval motion. The Receiver is advised that Santokh’s position is

that as a threshold matter and prior to initiating the Sale Process, the Court ought to finally determine the validity, enforceability and priority of Santokh's personal property security over the Golden Miles Property (the "**Santokh Security**").

Supplement to the Second Report of the Receiver, dated November 19, 2021, at para 2.

Amendments to the Appointment Order

13. The Companies had nominal balances in their bank accounts when the Appointment Order was issued. There were also no known accounts receivable or other current assets associated with the Flour Mill available to the Receiver to be monetized. Accordingly, the Receiver has had to borrow under Receiver Certificates, as contemplated in paragraph 21 of the Appointment Order, to fund the receivership, including for utilities, insurance, security, maintenance and professional costs.

Second Report at para 6.0(1).

14. The Receiver prepared a budget of the funds it requires until a transaction for the Flour Mill is completed along the timeline contemplated by the Sale Process, which the Receiver estimates to be up to \$2 million, subject to unknown or unforeseen costs (the "**Budget**"). If the Sale Process is not commenced in the week of November 22, 2021 as contemplated by the Receiver, the Budget will have to be extended, and increased, potentially materially.

Second Report at para 6.0(2); Appendix "D" to Second Report.

15. The Receiver is permitted to borrow up to \$500,000 pursuant to the terms of the existing Appointment Order.

16. In order to secure sufficient funding for the proceedings, after soliciting funding offers from a number of incumbent and new lenders, the Receiver accepted a financing term sheet (the “**Term Sheet**”), for up to \$2 million in funding, from RCM Capital Management, or a nominee thereof (“**RCM**”). The Receiver obtained two financing term sheets in addition to the Term Sheet with RCM, but determined that the RCM Term Sheet was the most attractive in the circumstances.

Second Report at paras 6.0(3)-(6); Appendix “E” to Second Report. *See also* Confidential Appendix to Second Report.

17. The key terms of the Term Sheet are summarized in the Second Report. Those terms include, among other things, a \$20,000 structuring fee upon initial advance and a \$20,000 extension fee if the Receiver extends the term beyond six months (collectively, the “**Fees**”). In addition, the annual interest rate under the Term Sheet is 10.5%.

Second Report at para 6.0(7).

18. To date, the Receiver has borrowed \$375,000 from RCM pursuant to the Term Sheet, excluding the \$20,000 structuring fee. Any further borrowing requests above \$500,000 are subject to the Appointment Order being amended to increase the cap on the Receiver’s borrowings.

Second Report at para 6.0(9).

19. The Receiver’s Charge and the Receiver’s Borrowings Charge (both as defined in the Appointment Order) currently rank below the charges of three equipment lessors, being Bodkin, a division of Bennington Financial Corp. (“**Bodkin**”), the Bank of Nova Scotia (“**BNS**”) and Caterpillar Financial Services Limited (“**Caterpillar**”).

Second Report at paras 2.1(4) and 6.1(4).

20. On its initial application, Skymark (the Applicant) did not serve Bodkin, BNS and Caterpillar, and accordingly did not seek to prime their security interests with the Court-ordered charges. However, this was explicitly “subject to further order of the Court”. The Receiver is now seeking that further order, on notice to Bodkin, BNS and Caterpillar.

Second Report at para 6.1(5); Appendix “A” to Second Report at para 21.

Receiver’s Activities

21. Since its appointment on October 1, 2021, the Receiver has undertaken a variety of activities in pursuing its mandate, including: (a) gathering information about the Property and the Companies; (b) corresponding with Companies’ creditors and other potential stakeholders in the Property; (c) corresponding with representatives of the City of Brantford regarding the status of the outstanding inspections and permits related to the Flour Mill, (d) corresponding with Canada Revenue Agency regarding the Companies’ payroll and the harmonized sales tax accounts; and (e) corresponding with the Applicant, and certain other stakeholders in the Companies, in preparation of the Sale Process. The Receiver is seeking the Court’s approval of such activities, as described in detail in the First and Second Reports.

Second Report at para 8.0(1).

PART III - ISSUES

22. The following issues are before the Court on this Motion:

- (a) Should the proposed Sale Process be approved, and commenced immediately?

- (b) Should this Court amend the Appointment Order to facilitate the Receiver borrowing the funds it requires to conduct the Sale Process and run these proceedings, in accordance with the Budget?
- (c) Should a sealing order be granted in respect of the Confidential Appendix?
- (d) Should this Court approve the Receiver's activities as described in the First and Second Reports?

23. In the Receiver's respectful submission, the answer to all four questions is yes.

PART IV - THE LAW AND DISCUSSION

A. The Proposed Sale Process Should be Approved

24. The proposed Sale Process should be approved and commenced immediately. The Receiver has prepared the Sale Process with a view to maximizing value for creditors in a fair, transparent and efficient manner. The Receiver notes in particular that:

- (a) *The Sale Process will be accessible to a wide group of interested parties:* any interested party that executes a non-disclosure agreement will be afforded an opportunity to participate in the proposed Sale Process;
- (b) *The Sale Process will provide interested parties with the time they need to properly diligence the opportunity:* the proposed Sale Process is contemplated to run for a total period of approximately 10 weeks and is sufficiently robust to provide the Property with adequate exposure to the market and maximize value for stakeholders; and

- (c) *Any sale pursuant to the Sale Process is subject to further approval of the Court:*
any transaction or transactions by the Receiver for the Property pursuant to the
Sale Process will require this Court's approval.

Second Report at para 4.0(5).

25. This Court has jurisdiction to approve the proposed Sale Process pursuant to section 243(1)(c) of the BIA.

BIA, section 243(1)(c).

26. Although the decision to approve a particular form of sale process is distinct from the approval of a proposed sale transaction, courts have held that the factors which a court is to consider on such motions are intertwined with and drawn from the oft-cited principles set out in *Royal Bank v Soundair Corp.*, being: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.

[*CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, 2012 ONSC 1750](#) at para 6 [*“blutip”*]; [*Royal Bank of Canada v Soundair Corp.*, 1991 CarswellOnt 205, 91 CBR \(5th\) 285 \(Ont CA\)](#) at para 16 [*“Soundair”*]; [*Choice Properties Limited Partnership v Penady \(Barrie\) Ltd.*, 2020 ONSC 3517](#) at para 16; [*Yukon \(Government of\) v Yukon Zinc Corporation*, 2020 YKSC 17](#) at para 62.

27. Accordingly, when reviewing a sales process proposed by a receiver a court should assess:
- i. the fairness, transparency and integrity of the proposed process;

- ii. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- iii. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

blutip, supra, at para 6.

28. The proposed sale process need not be perfect, only reasonable, and a court should also give significant weight to the recommendation of its receiver, a court-appointed officer with significant expertise in insolvency proceedings.

[*Marchant Realty Partners Inc. v 2407553 Ontario Inc.*, 2021 ONCA 375](#) at paras 10, 15 and 19; [*Re Sanjel Corporation*, 2016 ABQB 257](#) at para 80.

29. The Receiver submits that for all of the foregoing reasons it is commercially reasonable and appropriate to approve the Sale Process.

No Adjournment Should be Granted

30. It is imperative that the Sale Process be commenced immediately. The Receiver fundamentally disagrees with Santokh that the adjudication of the validity, enforceability and priority of the Santokh Security is a threshold issue to commencing the Sale Process, and the Receiver is concerned that any delay in starting the Sale Process will materially prejudice creditors of both Golden Miles and Mahal VC.

31. As the Receiver communicated to Santokh on November 17, 2021, the Sale Process must be commenced immediately for the following reasons:

- i. **Significant Carrying Costs:** The monthly carrying costs of the Receivership Proceedings are in excess of \$200,000, including insurance premiums, security for the Flour Mill, property taxes, borrowing costs, utilities and professional costs. The Receiver is required to borrow to fund these costs. Extending the Sale Process will materially increase the costs of this proceeding, and the borrowings required to fund these costs are secured in priority to all other claims in the proceedings – any delay in the Sale Process will unquestionably reduce distributions to the Companies’ creditors.

- ii. **Time-Limited Insurance Coverage:** The existing insurance policy on the Property expires on March 31, 2022. The insurers have not committed to extend coverage beyond this date. If coverage is extended, there is a possibility that the premium will increase. Delaying the commencement of the Sale Process will give rise to a real risk that the Property will become uninsured before a sale can be completed, and it will guarantee that additional costs are incurred on insurance premiums that could otherwise be avoided by a prompt sale.

- iii. **The Santokh Security Issues is a Priority Issue:** If Santokh has a priority to any of the Property, then upon the final determination of that priority, Santokh will be entitled to proceeds of sale in accordance with whatever priority and allocation is ultimately determined. There is no need to adjudicate the Santokh Security prior to commencing the Sale Process.

- iv. **Santokh is Improperly Attempting to Foreclose:** Even if Santokh has first priority to some or all of the Property (which he does not, because at a minimum the Receiver’s Charge and Receiver’s Borrowings Charge have Court-ordered priority over the Mahal

Security), that does not entitle him to selectively remove Property from the scope of the receivership proceedings. Any attempt by Santokh to remove Property on the basis of a first priority right of the Mahal Security (which unqualified first priority Santokh does not even claim to have) would be functionally equivalent to a foreclosure under section 65 of the *Personal Property Security Act* (the “**PPSA**”). A foreclosure is neither fair nor appropriate in the circumstances, and could be prevented by the mere filing of an objection by any party entitled to notice under section 63(4) of the PPSA. Any such objection being made (regardless of its merits) would trigger a statutory requirement that the Property be put up for sale. Accordingly, the Property ought to be sold by the Receiver pursuant to the Sale Process, and distributions of proceeds made in accordance with applicable priorities.

- v. **Adjudicating the Santokh Security is not a Simple Matter**: The Receiver will agree to an expedited timeline for the determination of the validity, enforceability and priority of the Santokh Security, however it is a complicated matter that will not be resolved quickly. Santokh has not yet served his motion material. The books and records currently available to the Receiver to inform its position on the Santokh Security are materially deficient as a result of the lack of disclosure and cooperation by the Mahals, and will need to be augmented. Other stakeholders must be given an opportunity to make submissions. The Trustee (defined below) will need to undertake a preference analysis, which will likely require examinations and cross-examinations. The availability of the parties and the Court will be affected by the impending holidays. Accordingly, the adjournment requested by Santokh will not be short, and at this stage such adjournment would be of an indeterminate length. The Sale Process cannot and should not be stalled.

- vi. **No Chill to the Sale Process:** Conducting the Sale Process in conjunction with adjudicating the issue of the Santokh Security will not be prejudicial or detrimental to the Sale Process. The Santokh Security issue is primarily a priority issue related to proceeds of sale, which will be irrelevant to a potential purchaser. In the event that Santokh seeks an order for the removal of certain equipment or other personal property (which the Receiver will object to), participants in the Sale Process will be notified as such. Should such a property claim be made, it is not unusual for certain assets in a sale process to be subject to adverse claims, and the Receiver is confident that the parties who may be interested in bidding on the Property are sufficiently sophisticated and knowledgeable of the milling industry that their diligence will take into account the dispute over the Santokh Security, and its likelihood of success.

- vii. **No Prejudice to Santokh:** The Sale Process is only a process. No sale is being recommended or approved, no distribution is being proposed, and no steps will be taken in furtherance of any final disposition of any of the Property without further order of the Court. If necessary, the validity and enforceability of the Santokh Security can be determined contemporaneously with the conduct of the Sale Process. Accordingly, commencing the Sale Process now does not prejudice Santokh's claims under his alleged security.

- viii. **Unfair Delay:** Nothing about the Santokh Security is new: it was allegedly granted by Golden Mile in December 2020 to secure approximately \$24.1 million of alleged pre-existing indebtedness. No evidence of advances made before or after the granting of the Santokh Security has been provided to the Receiver. In the absence of books and records, the Receiver could not independently assess the Santokh Security, and the Receiver has

only recently been informed that Santokh will be asserting that the Santokh Security secures post-December 2020 advances, even though no support has been provided for these alleged advances. The issue of the Santokh Security could have been asserted prior to the appointment of the Receiver, it could have been raised with the Court at the appointment hearing on October 1, 2021 where the Appointment Order was granted on consent, or it could have been raised at any point between the Receiver's appointment on October 1, 2021 and Santokh's request for an adjournment on November 16, 2021. It was not.

That the Santokh Security was only formally raised following the Receiver's service of its motion for approval of the Sale Process, and in that context only raised as a justification for delaying the commencement of the Sale Process, is unfair and prejudicial to the Companies' stakeholders who stand to benefit from an expedited, efficient Sale Process.

- ix. **The Receiver Already Has the Right to Market the Property:** The Appointment Order issued on October 1, 2021 was made on the consent of the Companies, with Santokh's counsel present at the hearing. Santokh executed the Minutes of Settlement on behalf of Golden Miles, which Minutes of Settlement provided for the Appointment Order to be issued. There is no question that the Receiver has been appointed over the Property (including whatever collateral Santokh claims a priority to), and no question that the Appointment Order authorizes the Receiver to market and sell the Property, subject to Court approval in certain cases. The Sale Process is merely the formalization of the Receiver's existing powers to sell the Property. The Sale Process approval order sought by the Receiver is not *creating* a right for the Receiver to sell the Property, it is providing procedural order, transparency and predictability to that pre-existing right to sell the Property. This is all in the best interests of the Companies' creditors generally. There is no

reason to delay the commencement of the Sale Process and the exercise of the Receiver's authority to market and negotiate for the sale of the Property.

D. The Appointment Order Should be Amended

32. The borrowing powers in the Appointment Order do not permit the Receiver to borrow sufficient funds to fulfil its mandate, as disclosed and forecast in the Budget. In order to fund the proceedings through the Sale Process, in accordance with the Budget and pursuant to the Term Sheet, the Receiver recommends that this Court make an order amending the Appointment Order to increase the borrowing limit in Paragraph 21 from \$500,000 to \$2 million.

Second Report at para 6.1(2).

33. As discussed above, the Term Sheet contemplates the Fees. In the Receiver's view, the existing language in Paragraph 21 of the Appointment Order is sufficient to permit the Receiver to pay the Fees (to the extent they are costs of borrowing, like interest, which the Receiver is explicitly empowered to pay). However, for the avoidance of doubt, the Receiver is seeking an amendment to the Appointment Order to explicitly provide for the payment of reasonable fees or charges incidental to borrowings.

Second Report at para 6.1(3).

34. The Receiver also seeks to amend the Appointment Order to elevate the priority of the Receivers' Charge and the Receiver's Borrowings Charge (both as defined in the Appointment Order) over the charges of Bodkin, BNS and Caterpillar.

Second Report at para 6.1(4).

35. In the Receiver's view, the proposed elevation of the Receiver's Charge and the Receiver's Borrowings Charge is fair and reasonable. Bodkin, BNS and Caterpillar will benefit from the receivership proceedings to the extent of their valid claims and to the extent of their priority, therefore any Property that is collateral charged by their interests, if any, ought to be subject to the charges that facilitate such proceeds being realized.

Second Report at para 6.1(6).

C. It is Appropriate to Grant a Sealing Order with Respect to the Confidential Appendix

36. In *Sierra Club of Canada v Canada (Minister of Finance)* ("**Sierra Club**"), the Supreme Court of Canada ("**SCC**") held that courts should exercise their discretion to grant sealing orders where:

- i. the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and
- ii. the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

[*Sierra Club of Canada v Canada \(Minister of Finance\)*, 2002 SCC 41](#) at para 53.

37. In *Sherman Estate v Donovan*, the SCC recast the test from *Sierra Club*, without altering its essence. According to *Sherman Estate*, a person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- i. court openness poses a serious risk to an important public interest;
- ii. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- iii. as a matter of proportionality, the benefits of the order outweigh its negative effects.

[*Sherman Estate v Donovan*, 2021 SCC 25](#) at para 38 [*“Sherman Estate”*].

38. Although the SCC was considering issues of personal privacy in *Sherman Estate*, it noted in citing *Sierra Club* that the term “important interest” can capture a broad array of public objectives including commercial interests.

Sherman Estate, *supra*, at para 41.

39. In the insolvency context, courts have commonly applied the *Sierra Club* test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.

[*Elleway Acquisitions Ltd v 4358376 Canada Inc.*, 2013 ONSC 7009](#) at paras 47 and 48; [*GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc.*, 2014 ONSC 1173](#) at para 32; [*Stelco Inc. \(Re\)*, 2006 CarswellOnt 394](#) at paras 2-5, [2006] OJ No. 275 (Ont SCJ); [*Re Canwest Publishing Inc.*, 2010 ONSC 222](#) at paras 63-65.

40. The test for a sealing order as recast in *Sherman Estate* has similarly been recently employed in the insolvency context to authorize sealing orders over confidential or commercially sensitive documents.

[*Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347](#) at paras 23-27; [*Laurentian University of Sudbury*, 2021 ONSC 4769](#) at paras 12-14.

41. The Confidential Appendix contains a comparison of the funding offers received from interested lenders and contains confidential, sensitive and competitive information, including proposed funding terms. If such information were disclosed, it would create a competitive disadvantage for the Receiver on any subsequent funding rounds (should the need arise), because the terms of prior offers would be known to the market, creating a ceiling.

Second Report at paras 6.1(1) and (2).

42. In the circumstances, the sealing order sought is the least restrictive means to maintain the confidentiality of this commercially sensitive, competitive and confidential information. Accordingly, the Receiver submits that the salutary effects of the sealing order outweigh the deleterious effects of restricting access to the Confidential Appendix, and that the sealing order is therefore appropriate.

D. The Receiver's Activities and the First and Second Reports Should be Approved

43. In *Target Canada*, the Court noted that a practice has developed in CCAA proceedings where Monitors will routinely seek approval for their reports and the activities described in them. The Court added that there are good policy and practical reasons to grant such approval, including (a) allowing the Monitor to bring its activities before the Court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners; (d) providing protection for the Monitor not otherwise provided by the CCAA; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the Monitor.

[Re Target Canada Co, 2015 ONSC 7574](#) at paras 2, 22 and 23.

44. These comments, and the policy considerations identified by the Court, apply with equal force to receivership proceedings and motions seeking approval for a receiver's report and activities.

[Re Hangfen Evergreen Inc., 2017 ONSC 7161](#) at para 15.

45. The activities of the Receiver, as set out in the First and Second Reports, were necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order and were in each case in the best interests of the Companies' stakeholders generally. The Receiver therefore respectfully submits that the First and Second Reports and the Receiver's activities described therein should be approved.

PART V - CONCLUSION

46. For the reasons set out above, the Receiver respectfully requests that this Court:
- i. approve the proposed Sale Process and authorize its commencement immediately;
 - ii. amend the Appointment Order;
 - iii. seal the Confidential Appendix; and
 - iv. approve the Receiver's activities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of November, 2021.



Chris Burr/Maia Jorgensen
Lawyers for the Receiver

SCHEDULE “A”

LIST OF AUTHORITIES

<u>Case</u>	
1.	<i>CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.</i>, 2012 ONSC 1750
2.	<i>Royal Bank of Canada v Soundair Corp.</i>, 1991 CarswellOnt 205, 91 CBR (5th) 285 (Ont CA)
3.	<i>Choice Properties Limited Partnership v Penady (Barrie) Ltd.</i>, 2020 ONSC 3517
4.	<i>Yukon (Government of) v Yukon Zinc Corporation</i>, 2020 YKSC 17
5.	<i>Marchant Realty Partners Inc. v 2407553 Ontario Inc.</i>, 2021 ONCA 375
6.	<i>Re Sanjel Corporation</i>, 2016 ABQB 257
7.	<i>Sierra Club of Canada v Canada (Minister of Finance)</i>, 2002 SCC 41
8.	<i>Sherman Estate v Donovan</i>, 2021 SCC 25
9.	<i>Elleway Acquisitions Ltd v 4358376 Canada Inc.</i>, 2013 ONSC 7009
10.	<i>GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc.</i>, 2014 ONSC 1173
11.	<i>Stelco Inc. (Re)</i>, 2006 CarswellOnt 394, [2006] OJ No. 275 (Ont SCJ)
12.	<i>Re Canwest Publishing Inc.</i>, 2010 ONSC 222
13.	<i>Ontario Securities Commission v Bridging Finance Inc.</i>, 2021 ONSC 4347
14.	<i>Laurentian University of Sudbury</i>, 2021 ONSC 4769
15.	<i>Re Target Canada Co</i>, 2015 ONSC 7574
16.	<i>Re Hangfen Evergreen Inc.</i>, 2017 ONSC 7161

SCHEDULE "B"

RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 243

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.

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
(Motion for Approval of Sale Process and
Ancillary Matters)
Returnable November 22, 2021**

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