

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

B E T W E E N:

PRICEWATERHOUSECOOPERS INC.

(solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

Applicant

- and -

2305145 ONTARIO INC. and MERK INVESTMENTS LTD.

Respondents

**FACTUM OF THE RECEIVER
(Settlement Approval and Ancillary Relief)**

April 4, 2024

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PART I - OVERVIEW¹

1. This factum is filed by Alvarez & Marsal Canada Inc. (“**A&M**”) in its capacity as court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings, and properties of 2305145 Ontario Inc. (formerly Skymark Finance Corporation) (“**230**”) and Merk Investments Ltd. (“**Merk**”, and together with 230, the “**Companies**”) in support of the Receiver’s motion for an order (the “**Settlement Approval Order**”), among other things:

- (a) approving the KLN Settlement as agreed to in minutes of settlement dated as of March 28, 2024 (the “**KLN Settlement Agreement**”) and the accompanying mutual full and final release (the “**KLN Release**”);
- (b) approving the Fourth Report and the conduct and activities of the Receiver described therein;
- (c) approving the Receiver’s statement of receipts and disbursements for the period from March 6, 2023 to March 27, 2024, as set out in the Fourth Report; and
- (d) abridging and validating the time for service of the Notice of Motion and the Motion Record, and dispensing with further service thereof.

2. As discussed in more detail below, the Receiver respectfully submits that the KLN Settlement Agreement represents a fair and reasonable compromise of the Receiver’s and KLN’s competing claims to the KLN Holdback (defined below) and ought to be approved by this Court.

¹ Capitalized terms used but not defined herein have the meanings given to them in the Fourth Report of the Receiver dated March 28, 2024 (the “**Fourth Report**”).

3. The balance of the relief sought on this motion is customary relief in receivership proceedings, and the Receiver respectfully submits that such relief is fair and appropriate in the circumstances, as discussed in more detail below.

4. The Receiver also advises the Court that, while the initial draft of the Settlement Approval Order included a provision sealing the KLN Settlement Agreement and KLN Release, the Receiver and KLN have since agreed that such relief is no longer necessary in the circumstances. Accordingly, the Confidential Appendix Brief dated April 2, 2024 and filed directly with Justice Steele via email may be added to, and form part of, the public Court file in these Proceedings.

PART II - FACTS

5. The factual basis for this motion is set forth in detail in the Fourth Report, not all of which is repeated herein.

Background

6. Pursuant to an order dated March 6, 2023 (the “**Appointment Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), A&M was appointed Receiver, without security, of the Companies’ Property.

Fourth Report, s. 1.2, Motion Record of the Receiver (Settlement Approval and Ancillary Relief) dated March 28, 2024 (“MR”), Tab 2.

7. Under the Appointment Order, the Receiver is empowered and authorized to, among other things, settle, extend, or compromise any indebtedness owing to 230 or Merk.

[Appointment Order, para. 3\(g\).](#)

8. 230 holds certain mortgages formerly registered on title to lands municipally known as 155 Adams Boulevard, Brantford, Ontario (the “**Adams Lands**”), including a \$9,600,000 charge that was registered on title to the Adams Lands on August 9, 2017 as instrument number BC322166 (the “**2017 Skymark Charge**”).

9. Among other transfers of charges from 230 to KLN, a transfer of a charge in the amount of \$900,000 from 230 to KLN was registered on title to the Adams Lands on May 7, 2018 as instrument number BC337603 (the “**Charge Transfer**”).

The 2017 Skymark Charge and Charge Transfer are described in detail in the Fifth Report of KSV Restructuring Inc. as Receiver and Manager of Mahal Venture Capital Inc. and Golden Miles Food Corporation (the “Mahal Receiver”) dated August 15, 2023 and filed in the Ontario Superior Court of Justice (Commercial List) in the Mahal receivership proceeding bearing court file number CV-21-00664778-00CL (“Mahal Fifth Report”) at s. 6.1, para. 1(b). The Fifth Report has been published on the Mahal Receiver’s website (URL: <https://www.ksvadvisory.com/experience/case/mahal-venture-capital-inc>).

10. The Adams Lands have since been sold in the Mahal Receivership, and \$1,047,826 of the proceeds of sale (the “**KLN Holdback**”) have been held back by the Mahal Receiver pending the resolution of 230’s and KLN’s competing claims regarding those funds.

See Fourth Report at paras. 4.1-4.7, MR, Tab 2.

11. The dispute regarding the KLN Holdback—which has been resolved by way of the KLN Settlement (subject to this Court’s approval)—can be summarized as follows:

- (a) The principals of 230 have asserted that the amounts secured by the Charge Transfer were repaid to KLN, and that the Charge Transfer should have been deleted from title to the Adams Lands. For this reason, the principals contend that 230 should be entitled to a portion of the proceeds of sale from the Adams Lands

in respect of 230's interest in the 2017 Skymark Charge without regard to the Charge Transfer (the "**230 Claim**"); and

- (b) KLN denies that any amounts that were repaid to it by 230 were in respect of the Charge Transfer, and asserts that the Charge Transfer is validly registered on title such that any and all amounts owing in respect of the Charge Transfer are properly payable to KLN (the "**KLN Claim**").

Fourth Report, paras. 4.8-4.9, MR, Tab 2.

12. The Receiver (for and on behalf of 230) and KLN have agreed to settle the 230 Claim and the KLN Claim pursuant to the terms of the KLN Settlement Agreement. The Receiver has entered into the KLN Settlement Agreement, which is conditional upon this Court's approval.

Fourth Report, para. 4.10, MR, Tab 2.

13. Pursuant to the KLN Settlement Agreement, the Receiver (on behalf of 230) and KLN shall each receive 50% of the KLN Holdback amount. The Receiver understands that the Mahal Receiver is seeking this Court's approval to distribute \$523,913 to the Receiver and \$523,913 to KLN on a motion in the Mahal Receivership at the same time that this motion will be heard.

Mahal Fifth Report, paras. 11-14.

14. The Receiver is of the view that the KLN Settlement Agreement represents a fair and reasonable compromise of the aforementioned issues which will (a) bring significant funds into the estate, (b) resolve the aforementioned issues and the related claims and contingent liabilities, (c) avoid the cost and risk to the estate, and use of the Court's resources, associated with

protracted litigation related to such claims and liabilities, and (d) continue to advance these Proceedings.

15. The Bridging Receiver, the senior secured lender of the Companies and likely the sole economic stakeholder in these Proceedings, supports and has consented to the KLN Settlement Agreement.

Fourth Report, para. 4.14, 7.1, MR, Tab 2.

Approval of Fourth Report and Receiver's Activities

16. The activities of the Receiver up until February 15, 2023, the date of the Third Report, and the Receiver's receipts and disbursements for the period March 6, 2023 to February 5, 2024, have already been approved by this Court.

[First Settlement Approval Order, paras. 7-8.](#)

17. On this motion, the Receiver is seeking the approval of: (a) of the Receiver's Fourth Report and its conduct and activities described therein; and (b) the Receiver's receipts and disbursements for the period March 6, 2023 to March 27, 2024

Fourth Report, s. 5.1, MR, Tab 2.

PART III - ISSUES

18. This motion raises the following questions:

- (a) Should the Settlement Approval Order approving the KLN Settlement Agreement be granted?
- (b) Should this Court approve the Receiver's receipts and disbursements and activities as described in the Fourth Report?

19. The Receiver respectfully submits that this Court should grant all of the foregoing relief for the reasons that follow.

PART IV - LAW & ARGUMENT

The KLN Settlement Agreement Should be Approved

20. There is an overriding public interest that favours the settlement of disputes. Courts encourage and facilitate such settlements because it is sound judicial policy which contributes to the effective administration of justice.

[Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37 at paras. 11-12.](#)

21. Generally speaking, a court will consider the following when asked to approve a settlement agreement in the context of an insolvency proceeding:

- (a) whether the settlement is fair and reasonable;
- (b) whether it provides substantial benefits to other stakeholders; and
- (c) whether it is consistent with the purpose and spirit of the relevant insolvency legislation.

[Maple Bank GmbH, Re, 2016 ONSC 7218 at para. 8](#) (Per Morawetz R.S.J, as he then was) (“*Maple Bank*”); See also [Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corp., 2013 ONSC 1078 at para. 49](#) and [Robertson v. ProQuest Information & Learning Co., 2011 ONSC 1647 at para. 22.](#)

22. In the context of a receivership proceeding specifically, courts will often frame the test in the same manner as the test set out by the Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* for the approval of sale transactions. The *Soundair* factors are:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

- (b) whether the interests of all parties have been considered;
- (c) the efficacy and integrity of the process by which offers were obtained; and
- (d) whether there has been unfairness in the working out of the process.

[Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 \(ON CA\)](#) (“*Soundair*”). Examples of this Court applying the *Soundair* factors in settlement approval motions brought in receivership proceedings include *Bakemates International Inc., Re*, [2003] O.J. No. 3191 at paras. 13, 15 (S.C.J.), Book of Authorities of the Receiver dated April 4, 2023 (“BOA”), Tab 1, affirmed [\[2004\] O.J. No. 2463 \(C.A.\)](#) (“*Bakemates*”); *Ravelston Corp., Re* (2005), 142 A.C.W.S. (3d) 18 at para. 3 (Ont. S.C.J. (Commercial List)), BOA, Tab 2; and, [IWHL Inc., Re, 2011 ONSC 5672 at paras. 4-5](#) (Commercial List) (“*IWHL*”).

23. To satisfy the *Soundair* criteria in the settlement context, the Receiver must consider the available information and use its expertise to determine how to maximize the value of the rights subject to the settlement. When the Receiver wishes to settle a claim for or against the estate, it will meet its obligations so long as the proposed compromise is commercially reasonable.

[IWHL, supra, at para. 6.](#)

24. There is a subtle difference between settlement agreements and sale agreements in that the courts are “experts” in matters of law and are, at least in theory, able to analyze the strengths and weaknesses of a cause of action to be compromised. It is, however, necessary and appropriate for Courts to defer to the decision of a receiver who negotiated a settlement in cases where that settlement raises complex issues or where the receiver is simply in a better position to evaluate the merits of the settlement.

[Maple Bank, supra, at para. 9; Nortel Networks Corp., Re, 2010 ONSC 1096 at paras. 34-35 \(Commercial List\).](#) See also [Crown Trust Co. et al. v Rosenberg et al., 1986 CanLII 2760 \(ON SC\) at para. 84](#) addressing the importance of the Receiver’s role and business judgment in the context of a sale approval motion.

25. As set out in the Fourth Report, the Receiver respectfully recommends that this Court approve the Settlement Agreements for the following reasons:

- (a) the KLN Settlement will result in a material realization to the 230 estate and eliminate the costs and risk associated with complex and protracted litigation in respect thereof;
- (b) the KLN Settlement was negotiated among two sophisticated parties and represents a reasonable compromise of the claims and issues related to the KLN Holdback;
- (c) the Bridging Receiver (likely the sole economic stakeholder in these Proceedings) supports and has consented to the KLN Settlement; and
- (d) the Receiver is of the view that the KLN Settlement Agreement is fair and reasonable in all respects and is for the general benefit of the estate.

26. Taking these considerations into account, the Receiver respectfully submits that the criteria set out in *Maple Bank* and *Soundair* are satisfied for the following reasons:²

- (a) *Sufficient effort was made to obtain the best price:* The KLN Settlement was negotiated by sophisticated parties represented by legal counsel. In the Receiver's view, it has achieved a favourable result and further negotiations would not have produced a better outcome.
- (b) *The interests of all parties have been served:* The KLN Settlement provides for the best possible outcome in the circumstances for all parties with an economic interest

² The Receiver submits that the settlement approval criteria set out in *Maple Bank* and *Soundair* are different iterations of the same test and that the criteria set forth in those cases are co-extensive. In the Receiver's view, the enunciation of the test in *Soundair* ought to be preferred in the context of a receivership proceeding pursuant to this Court's decision in *Bakemates* (affirmed by the Court of Appeal) and *IWHL*.

in these Proceedings. The KLN Settlement Agreement represents a positive development in these Proceedings and is expected to result in material realizations for the benefit of 230's creditors and reduce the ongoing administrative costs to the estate and professional fee costs of the Receiver in managing the underlying issues and claims.

- (c) *The settlement negotiations were conducted with integrity:* The settlement negotiations were conducted, with integrity and due diligence and in good faith. The Receiver has not received any objections or concerns regarding the KLN Settlement Agreement.
- (d) *There was no unfairness:* In the Receiver's view, there has been no unfairness in the conduct of the settlement negotiations. The negotiations were robust and achieved a favourable result for the benefit of the estate.

27. For the foregoing reasons, the Receiver requests that this Court grant the Settlement Approval Order approving the KLN Settlement Agreement.

The Receipts and Disbursements and Activities of the Receiver as described in the Fourth Report Should be Approved

28. Where a court-appointed receiver meets the objective test of demonstrating that it has acted reasonably, prudently, and not arbitrarily, this Court has the inherent jurisdiction to approve the receiver's activities as set out in its reports.

Bank of America Canada v. Willann Investments Ltd., [1993] O.J. No. 1647 (O.C.J. Gen. Div.) at paras. 2-5, BOA, Tab 3; [aff'd \[1996\] O.J. No. 2806 \(C.A.\)](#); [Lang Michener v. American Bullion Minerals Ltd.](#), 2005 BCSC 684 at para. 21.

29. In *Target Canada*, this Court identified several good policy and practical reasons for monitors in *Companies' Creditors Arrangement Act* ("CCAA") proceedings to routinely seek court approval of their reports and activities, and for courts to grant such approval. These include:

- (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 a prudent and diligent manner; (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.

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

30. This Court has determined that these policy and practical reasons apply equally to receivership proceedings and motions seeking approval of a receiver's report and activities.

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

31. All of the Receiver's receipts, disbursements, and activities, as set out in the Fourth Report, were reasonable, necessary, and undertaken in good faith and in accordance with the Receiver's powers and duties as set out in the Appointment Order, and were undertaken in the best interests of the Companies' stakeholders. Accordingly, the Fourth Report and the receipts, disbursements, and activities of the Receiver described therein should be approved.

PART V - ORDER REQUESTED

32. For the reasons set out above, the Receiver respectfully requests that this Court:

- (a) grant the Settlement Approval Order approving and effecting the KLN Settlement Agreement;
- (b) approve the Fourth Report and the Receiver's conduct and activities described therein;
- (c) approving the Receiver's statement of receipts and disbursements for the period from March 6, 2023 to March 27, 2024, as set out in the Fourth Report; and

- (d) abridge and validate the time for service of the Notice of Motion and the Motion Record, and dispense with further service thereof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of April, 2024.

Per: *Fasken Martineau DuMoulin LLP*

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SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37](#)
2. [*Maple Bank GmbH, Re*, 2016 ONSC 7218](#)
3. [*Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078](#)
4. [*Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647](#)
5. [*Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 \(ON CA\)](#)
6. *Bakemates International Inc., Re*, [2003] O.J. No. 3191 [See BOA]
7. [*Bakemates International Inc. v Marmac Holdings Inc.*, 2004 CanLII 59994 \(ON CA\)](#)
8. *Ravelston Corp., Re* (2005), 142 A.C.W.S. (3d) 18 [See BOA]
9. [*IWHL Inc., Re*, 2011 ONSC 5672](#)
10. [*Nortel Networks Corp., Re*, 2010 ONSC 1096](#)
11. [*Crown Trust Co. et al. v Rosenberg et al.*, 1986 CanLII 2760 \(ON SC\)](#)
12. *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 1647 (O.C.J. Gen. Div.)
13. [*Lang Michener v American Bullion Minerals Ltd.*, 2005 BCSC 684](#)
14. [*Target Canada Co., \(Re\)*, 2015 ONSC 7574](#)
15. [*Hangfen Evergreen Inc., \(Re\)* 2017 ONSC 7161](#)

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Proceeding commenced at Toronto

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