

**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 -

SKYMARK FINANCE CORPORATION and MERK INVESTMENTS LTD.

Respondents

APPLICATION UNDER Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

**FACTUM OF THE RECEIVER
(SISP Approval)**

May 23, 2023

FASKEN MARTINEAU DUMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
P.O. Box 20
Toronto, ON M5H 2T6

Dylan Chochla (LSO: 62137I)
dchochla@fasken.com
Tel: 416 868 3425

Mitch Stephenson (LSO: 73064H)
mstephenson@fasken.com
Tel: 416 868 3502

Lawyers for the Receiver,
Alvarez & Marsal Canada Inc.

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PART I – OVERVIEW

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 each of Skymark Finance Corporation (“**Skymark**”) and Merk Investments Ltd. (“**Merk**”, and together with Skymark, the “**Respondents**”), in support of the Receiver’s motion for:

- (a) an order, substantially in the form of the draft order located at Tab 4 of the Motion Record filed herewith (the “**SISP Approval Order**”) which provides for, among other things:
 - (i) abridging and validating the time for service of the Notice of Motion and Motion Record filed herewith and dispensing with further service thereof;
 - (ii) approving the first report of the Receiver, dated May 17, 2023 (the “**First Report**”), and the actions, conduct, and activities of the Receiver described therein;
 - (iii) approving the sale and investment solicitation process (the “**SISP**”) set out and described in Schedule “A” to the SISP Approval Order (the “**SISP Document**”)¹ to identify one or more purchasers of and/or investors in the Consumer Portfolio (as defined below), other Assets, and/or Business of Skymark to make a Bid; and

¹ Capitalized terms used but not otherwise defined herein have the meanings given to them in the SISP Document which is Schedule “A” to the SISP Approval Order, Motion Record of the Receiver (SISP Approval), dated May 17, 2023 (“**MR**”), Tab 4.

(iv) authorizing and directing the Receiver to perform its obligations under the SISP and SISP Approval Order and to take such steps and execute such documentation as the Receiver considers necessary or desirable in carrying out such obligations, provided that prior approval of this Court shall be obtained before the completion of any transaction(s) under the SISP; and

(b) such further and other relief as this Honourable Court may deem just.

2. The primary business of Skymark is providing financing and leasing to consumer borrowers for home renovations, water systems, HVAC systems, and smart home improvements. Each of these loans and leases are generally secured by a Notice of Security Interest registered by Skymark on title against the real property on which the financed/leased equipment is located.

First Report, s. 3.2; MR, Tab 2.

3. The Receiver has developed the SISP to solicit interest in: (a) a purchase of, or investment in, all or part of Skymark's portfolio of leases and loans to residential and commercial consumer borrowers primarily in respect of water systems, HVAC systems, and smart home improvements (the "**Consumer Portfolio**"); and/or (b) a purchase of, or investment in, any or all of Skymark's Assets or Business (collectively, the "**Opportunity**").

First Report, s. 6.1, MR, Tab 2.

4. The SISP is to be conducted in a single phase with three stages—pre-marketing, marketing, and offer submission and evaluation—and is expected to conclude in late July, 2023 with the closing of a Transaction, subject to this Court's approval.

See SISP Document, para. 9, Schedule “A” to the SISP Approval Order, MR, Tab 4. The target dates for key SISP milestones may be extended by the Receiver in accordance with the SISP Approval Order.

5. The SISP is set out in detail in the SISP Document and in the First Report. The description of the SISP provided herein is for summary purposes only and reference should be made to the SISP Document for its actual terms.

See, generally, the First Report, Section 6, “*The Proposed SISP*”, ss. 6.1-6.14, MR, Tab 2 and the SISP Document, Schedule “A” to the SISP Approval Order, MR, Tab 4.

6. As set out in Part IV below, the Receiver recommends that the Court grant the SISP Approval Order on the grounds that: (a) the SISP is commercially reasonable; (b) due diligence materials are ready to be made available to Known Potential Bidders and are sufficient to complete a fair and efficient sale process; (c) the duration of the SISP is appropriate in the circumstances; (d) an expedited SISP is necessary as the Receiver’s funding is limited; and (e) the Respondents’ senior secured lender has approved of the SISP and the target dates for key SISP milestones.

First Report, s. 6.14, MR, Tab 2.

7. Given the foregoing, the Receiver respectfully submits that the SISP is fair and reasonable and will maximize value for creditors, and that it ought to be approved as a result.

PART II – FACTS

8. The relevant facts are set out in detail in the First Report.

PART III – ISSUES

9. This motion raises two issues to be determined by the Court:

- (a) should the SISP be approved?; and

- (b) should the First Report and the Receiver's activities described therein be approved?

10. As set out in Part IV below, the Receiver respectfully submits that the answer to both questions is "yes".

PART IV – LAW & ARGUMENT

(a) The SISP should be approved

11. This Court has jurisdiction to approve the proposed SISP under section 243(1)(c) of the *Bankruptcy and Insolvency Act* (Canada).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(1)(c).

12. While the decision to approve a sale process is distinct from the decision to approve the ultimate sale, the reasonableness and adequacy of any sale process proposed by a court-appointed receiver must be assessed in light of factors that a court will take into account when considering the approval of a proposed sale. The Court of Appeal summarized those factors in *Royal Bank v. Soundair* as follows:

- (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 are obtained; and
- (d) whether there has been unfairness in the working out of the process.

Choice Properties Limited Partnership v. Penady (Barrie) Ltd., 2020 ONSC 3517 [Choice Properties] at para. 15; *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 [CCM Master] at para. 6; *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) [Soundair].

13. The exercise that a court must perform when deciding whether to approve a sale process is to keep the *Soundair* factors in mind while assessing:

- (a) the fairness, transparency, and integrity of the proposed sale process;
- (b) the commercial efficacy of the proposed sale process in light of the specific circumstances facing the receiver; and
- (c) whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

Ontario Securities Commission v. Bridging Finance Inc., 2021 ONSC 5338 at paras. 7-8; *Choice Properties*, *supra*, at para. 16; *CCM Master*, *supra*, at para. 6.

14. A proposed sale process need not be perfect, only reasonable. Absent exceptional circumstances, courts generally defer to the business expertise of the court-appointed receiver and are encouraged not to intervene or “second-guess” the receiver’s recommendation.

See *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at para. 15 citing *Regal Constellation Hotel Ltd., Re.*, [2004] O.J. No. 2744 (C.A.) at para. 23. See also *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 at paras. 43-45.

15. A&M was appointed Receiver by this Court pursuant to the Order of Justice Penny, dated March 6, 2023 (the “**Appointment Order**”), which authorizes the Receiver to, among other things, market any or all of the present and future assets, undertakings, and properties of the Respondents acquired for, or used in relation to the business carried on by the Respondents and all proceeds thereof (the “**Property**”), including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

First Report, s. 1.2 & Appendix “A” (Appointment Order), para. 3(j), MR, Tab 2.

16. In accordance with the Appointment Order, the Receiver has developed the SISP to solicit Bids by a set Bid Deadline. Under the SISP, the Receiver shall maintain the ability to extend the Bid Deadline, or any other target date contemplated in the SISP, in order to maintain a robust sale process. Following the receipt and qualification of Bids, if the Receiver qualifies more than one Bid, it may: (a) select one or more of the most favourable Qualified Bids for acceptance as the Successful Bid(s); or (b) at its discretion, invite the Bidders who submitted such Qualified Bids to participate in an Auction to be conducted in accordance with the SISP.

First Report, ss. 6.6-6.7, MR, Tab 2.

17. As set out in the SISP Document, the Receiver shall be under no obligation to: (a) designate the highest or otherwise best Bid, or any Bid, as a Qualified Bid; (b) accept the highest or best Bid, or any Bid, as the Successful Bid(s); or (c) conduct an Auction in any circumstance. In addition, the Receiver will have the ability to adopt such other procedures or rules for the SISP, including for the Auction (if one is held), as it considers appropriate.

First Report, ss. 6.8 & 6.12, MR, Tab 2.

18. The SISP provides that the Receiver will consult with the Bridging Receiver (the Respondents’ senior secured lender) as the Receiver considers appropriate and in accordance with the SISP, including with respect to Bids received. To protect the integrity of the SISP, the SISP provides that, if the Bridging Receiver submits a Bid, it will no longer be provided with consultation rights or otherwise be entitled to review the Bids received, unless and until it has been notified by the Receiver that its Bid has not been selected as the Successful Bid.

First Report, s. 6.11, MR, Tab 2.

19. The outside date for closing a Transaction under the SISP is anticipated to fall in late July, 2023, or such other date as the Receiver may determine in accordance with the SISP Approval Order. The Receiver will make a motion to the Court to obtain approval of the Transaction contemplated by the Successful Bid(s) as soon as practicable after the selection of the Successful Bid(s).

**See SISP Document, para. 9, Schedule “A” to the SISP Approval Order, MR, Tab 4;
First Report, s. 6.13, MR, Tab 2.**

20. As set out in its First Report, the Receiver recommends that this Court approve the SISP for the following reasons:

- (a) it is the Receiver’s view that the SISP is commercially reasonable;
- (b) the Receiver is of the view that the information expected to be made available will be sufficient for an interested party to make an informed decision and to prepare a bid in respect of the Opportunity;
- (c) it is the Receiver’s view that the SISP, while expedited, is sufficient to allow interested parties to perform diligence and submit offers; many of the parties that will be contacted by the Receiver during the SISP are familiar with this Opportunity given their history in the industry or as a competitor of Skymark and, as a result, they should not require a prolonged diligence period to determine whether they would like to submit a Bid;

- (d) an expedited process is required as the Receiver does not have access to sufficient funding to support the costs associated with conducting a prolonged SISP; and
- (e) the Bridging Receiver, as the Respondents' senior secured lender and possibly the only stakeholder with an economic interest in the SISP, has approved of the SISP and the target dates for key SISP milestones.

First Report, s. 6.14, MR, Tab 2.

21. For the foregoing reasons, the Receiver respectfully submits that it is commercially reasonable and appropriate for the Court to approve the SISP.

(b) The First Report and the Receiver's activities described therein should be approved

22. This Court has held that there are good policy and practical reasons for approving receiver's reports and the activities described therein. Specifically, Court approval:

- (a) allows the receiver to move forward with the next steps in the proceedings;
- (b) brings the receiver's activities before the court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
- (d) enables the court to satisfy itself that the receiver's activities have been conducted in prudent and diligent manners;
- (e) provides additional protection for the receiver not otherwise provided; and

- (f) protects the creditors from the delay and distribution that would be caused by re-litigating steps already taken, and potential indemnity claims by the Receiver.

Re Hanfeng Evergreen Inc., 2017 ONSC 7161 at paras. 15-17 citing *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras. 20-24 (Myers J. held that the principles that apply to the approval of the reports and activities of a court-appointed monitor under the *Companies' Creditors Arrangement Act* applied equally in the case of a court-appointed receiver). See also *Laurentian University of Sudbury*, 2022 ONSC 5850 at para. 17.

23. The activities of the Receiver, as set out in the First Report, were necessary and undertaken in good faith pursuant to the Receiver's duties and powers under the Appointment Order and were, in each case, in the best interests of the Respondents' stakeholders generally.

24. The provision in the SISP Approval Order which addresses the approval of the Receiver's First Report and activities is subject to the usual stipulation that it may only be relied upon by the Receiver in its personal capacity and only with respect to its own personal liability.

SISP Approval Order, para. 3, MR, Tab 4.

25. The Receiver respectfully submits that the First Report and the Receiver's activities described therein should be approved.

PART V – ORDER REQUESTED

26. The Receiver respectfully requests that this Honourable Court grant:

- (a) an order, substantially in the form of the SISP Approval Order, which provides for, among other things:
- (i) abridging and validating the time for service of the Notice of Motion and Motion Record filed herewith and dispensing with further service thereof;

- (ii) approving the First Report, and the actions, conduct, and activities of the Receiver described therein;
 - (iii) approving the SISP, set out and described in the SISP Document, to identify one or more purchasers of and/or investors in the Consumer Portfolio, other Assets, and/or Business of Skymark to make a Bid; and
 - (iv) authorizing and directing the Receiver to perform its obligations under the SISP and SISP Approval Order and to take such steps and execute such documentation as the Receiver considers necessary or desirable in carrying out such obligations, provided that prior approval of this Court shall be obtained before the completion of any Transaction(s) under the SISP; and
- (b) such further and other relief as this Honourable Court may deem just.

RESPECTFULLY SUBMITTED THIS 23RD DAY OF MAY, 2023



Dylan Chochla



Mitch Stephenson

Lawyers for the Receiver,
Alvarez & Marsal Canada Inc.

SCHEDULE "A"

AUTHORITIES CITED

1. [*Choice Properties Limited Partnership v Penady \(Barrie\) Ltd*, 2020 ONSC 3517](#)
2. [*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750](#)
3. [*Royal Bank of Canada v Soundair Corp* \(1991\), 4 OR \(3d\) 1, 7 CBR \(3d\) 1 \(Ont CA\)](#)
4. [*Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 5338](#)
5. [*Marchant Realty Partners Inc v 2407553 Ontario Inc*, 2021 ONCA 375](#)
6. [*Regal Constellation Hotel Ltd., Re.*, \[2004\] O.J. No. 2744 \(C.A.\)](#)
7. [*Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857](#)
8. [*Re Hanfeng Evergreen Inc*, 2017 ONSC 7161](#)
9. [*Target Canada Co. \(Re\)*, 2015 ONSC 7574](#)
10. [*Laurentian University of Sudbury*, 2022 ONSC 5850](#)

SCHEDULE “B”

LEGISLATION

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

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

APPLICATION UNDER Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

PRICEWATERHOUSECOOPERS INC.

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

-and- SKYMARK FINANCE CORPORATION and MERK INVESTMENTS LTD.

Applicant

Respondents

Court File No. CV-22-00692309-00CL

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

**Proceeding commenced at
Toronto**

**FACTUM OF THE RECEIVER
(SISP Approval)**

FASKEN MARTINEAU DUMOULIN LLP

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

Dylan Chochla (LSO: 62137I)

dchochla@fasken.com

Tel: 416 868 3425

Mitch Stephenson (LSO: 73064H)

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