

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

**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)**

February 21, 2024

FASKEN MARTINEAU DuMOULIN LLP

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6
Fax: 416 364 7813

Dylan Chochla (LSO: 62137I)

dchochla@fasken.com
Tel: 416 868 3425

Mitch Stephenson (LSO: 73064H)

mstephenson@fasken.com
Tel: 416 868 3502

Montana Licari (LSO: 85097G)

mlicari@fasken.com
Tel: 416 868 3450

Lawyers for the Receiver, Alvarez & Marsal
Canada Inc.

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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 Orr Settlement as agreed to in minutes of settlement dated as of January 24, 2024 (the “**Orr Settlement Agreement**”) and the accompanying mutual full and final release (the “**Orr Release**”);
- (b) approving the Industrial Road Loan Settlement as agreed to in minutes of settlement dated as of February 14, 2024 (the “**FIJ Settlement Agreement**”) and the accompanying mutual full and final release (the “**FIJ Release**”);
- (c) approving the Bridging Assignment as agreed to in an assignment and assumption agreement dated as of February 15, 2024 (the “**Bridging Assignment Agreement**”) pursuant to which the Receiver has agreed to assign to the Bridging Receiver its interest in a loan made by 230 to 2581150 Ontario Inc. (“**258**”), in consideration of a release from the Bridging Receiver of claims it has against 230 in respect of a substantially similar loan that Bridging advanced to 230;²
- (d) sealing, subject to further order of the Court, copies of (i) the Orr Settlement Agreement and Orr Release and (ii) the FIJ Settlement Agreement and FIJ Release,

¹ Capitalized terms used but not defined herein have the meanings given to them in the Third Report of the Receiver dated February 15, 2024 (the “**Third Report**”).

² The Orr Settlement Agreement, Orr Release, FIJ Settlement Agreement, FIJ Release, and Bridging Assignment Agreements are referred to collectively herein as the “**Settlement Agreements**”.

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filed as Confidential Appendices “B” and “C” to the Third Report (the “**Confidential Appendices**”), respectively;

- (e) approving the Third Report and the conduct and activities of the Receiver described therein;
- (f) approving the Receiver’s statement of receipts and disbursements for the period from March 6, 2023 to February 5, 2024, as set out in the Third Report;
- (g) approving the fees and disbursements of the Receiver and its legal counsel as set out in the Karpel and Chochla Affidavits (defined below) and attached as Appendices “F” and “G” to the Third Report, respectively; and
- (h) such further and other relief as this Court may deem just.

2. The Receiver respectfully submits that the Settlement Approval Order should be granted on the following grounds:

- (a) the Orr Settlement will result in a material realization to the 230 estate and will eliminate the costs and risks associated with complex and protracted litigation in respect of the Orr Claim and Orr Priority Claim, each of which raise complex issues concerning a number of alleged trust declarations made by the Companies in respect of certain mortgages;
- (b) the Industrial Road Settlement represents a reasonable compromise of 230’s alleged claim against Damages Counsel—a claim arising from the stay of 230’s Damages Action, which 230 commenced in 2017 to recover losses it incurred in connection with the Industrial Road Loan—and will result in a material recovery to the 230 estate without the costs or risks of pursuing an action against Damages Counsel through the courts;
- (c) the Bridging Assignment will consolidate 230’s and Bridging’s respective interests in the 258 Loan (which Skymark advanced to 258) and the Additional Loan (which Bridging advanced to 230 for the purpose of funding the 258 Loan), effectively

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removing 230 as the intermediary and streamlining any enforcement efforts that may be taken;

- (d) in the view of the Bridging Receiver, the Bridging Assignment will formalize and document the terms of the Original Assignment (defined below) which 230 made to Bridging before either of those entities were put into receivership;
- (e) irrespective of whether the assignment referred to in (d) in fact took place, the Assignment Agreement will result in a desirable outcome that sees 230 released from its obligations under the Additional Loan at no cost to the estate and will allow the Bridging Receiver to take carriage of any proceedings related to the 258 Loan and 258 Security;
- (f) the Bridging Receiver, the senior secured lender of 230 and likely the sole economic stakeholder in these Proceedings, supports and has consented to each of the Settlement Agreements;
- (g) each of the Settlement Agreements is conditional upon the approval of this Court;
- (h) the Settlement Agreements will resolve three major issues concerning the Companies' estate, namely: (i) the Orr Claim and Orr Priority Claim; (ii) the Industrial Road Loan; and (iii) the 258 Loan, and, taken together, will significantly advance these Proceedings;
- (i) the Orr Settlement Agreement and FIJ Settlement Agreement which, along with the accompanying releases, comprise the Confidential Appendices, each contain a confidentiality provision which requires that the agreements be held in strict confidence by the parties thereto and each contains commercially-sensitive information about either the Orr Plaintiffs or Damages Counsel and their affiliates, as applicable, the disclosure of which will likely prejudice the legitimate economic and commercial interests of those parties;

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- (j) the salutary effects of sealing the Confidential Appendices—particularly the promotion of the public interest favouring the settlement of disputes—outweigh any deleterious effects;
- (k) the Receiver has undertaken several activities in connection with its mandate, all of which have been necessary and are consistent with its duties and powers, and have been undertaken with efficiency and reasonableness in the interests of the Companies’ stakeholders generally; and
- (l) the fees and disbursements incurred by the Receiver and its counsel are reasonable and appropriate in the circumstances.

3. The Receiver also files this factum in response to a motion brought by the Orr Plaintiffs, to be heard at the same time as the Receiver’s motion, for an order lifting the stay of proceedings provided for in paragraphs 9 and 10 of the Appointment Order of Justice Penny for the limited purpose of producing certain financial records of the Companies. While the Receiver has consented to the bulk of the relief sought by the Orr Plaintiffs and has agreed to a form of order (the “**Responding Production Order**”), the parties disagree on who should bear the cost of producing the documents as provided for in that draft Order.

4. The Receiver respectfully submits that the Orr Plaintiffs ought to be responsible for the aforementioned costs, including the reasonable fees and disbursements of the Receiver and its legal counsel, for the following reasons:

- (a) the Responding Production Order and any expense related thereto is for the sole benefit of the Orr Plaintiffs and will not benefit any other stakeholder; and
- (b) in what appears to be the only reported case on this issue, this Court held that an insolvent estate should not bear the costs of document production when the estate generally does not have anything to gain from the underlying litigation.

5. Given the foregoing, and in the absence of any access to justice concerns, it is unfair and unreasonable for the estate, and ultimately the Bridging Receiver (the senior secured lender of the Companies) and the multitude of stakeholders in the Bridging receivership proceedings to be asked to fund the document discovery to further the Orr Plaintiffs' claims against the non-settling defendants in the Orr Action and Related Action.

6. In the circumstances, it is more appropriate for the Orr Plaintiffs to cover the reasonable costs associated with the collection and production of documents pursuant to the Responding Production Order. If the Orr Plaintiffs succeed in the litigation, they will have an opportunity to claim those costs against any unsuccessful defendants.

PART II - FACTS

7. The relevant facts are set out in detail in the Third Report at Tab 2 of the Motion Record and are only briefly summarized herein.

Background

8. 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.

Third Report, s. 1.2, Motion Record of the Receiver (Settlement Approval and Ancillary Relief) dated February 15, 2024 ("MR"), Tab 2.

9. Before these Proceedings, the primary business of 230 was providing financing and leasing to consumer borrowers (the "**Consumer Portfolio**") for home renovations, water systems, HVAC systems, and smart home improvements. On September 26, 2023, the Court issued the Approval and Vesting Order approving the sale of the Consumer Portfolio following the completion of a Court-approved sale process. The underlying Sale Transaction has since closed.

Third Report, ss. 1.5, 3.2, MR, Tab 2.

10. The remaining assets of 230 include a number of ‘non-core’ loans made to third parties outside of Skymark’s primary business, including (among other loans):

- (a) *The Industrial Road Loan*—\$1.2 million advanced by 230 (the “**Industrial Road Loan**”) to third-party borrowers (the “**Industrial Road Borrowers**”) to fund a standby letter of credit to be issued to the Ontario Ministry of Finance (the “**Ministry**”) as security in favour of the Ministry for Tobacco Tax Registration Certificates and ongoing tax obligations, to be drawn upon in the event that the Industrial Road Borrowers failed to make payment to the Ministry of required taxes or permit fees. The Industrial Road Loan was secured by liens in respect of certain farm equipment and a mortgage in respect of real property located on Industrial Road in Delhi, Ontario (the “**Industrial Road Property**”); and
- (b) *The 258 Loan*—a loan (the “**258 Loan**”) made pursuant to the terms of a letter agreement dated as of July 7, 2017 (as may have been amended, supplemented, restated, replaced or otherwise modified, the “**258 Credit Agreement**”) by 230 to 258, a company related to 230. The 258 Loan was made in connection with the acquisition by 258 of certain assets of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited (together, the “**Thomas Canning Entities**”). The 258 Loan is secured by, among other security, mortgages registered in favour of 230 on title to certain real property that 258 acquired from the Thomas Canning Entities.

Third Report, s. 3.3, MR, Tab 2.

11. The Companies are also defendants in two actions, the Orr Action and the Related Action, in which the Orr Plaintiffs have asserted against the Companies and several other defendants (including the principals of the Companies) claims in respect of a number of mortgages that were purportedly held in trust by 230 or Merk for the Orr Plaintiffs (collectively, the “**Orr Claim**”). One of the Orr Plaintiffs, 1989474 Ontario Inc. (“**198Co**”), has also asserted a priority

claim in the MVCI/Golden Miles Receivership Proceedings over proceeds that are contested between 230 and 198Co (the “**Orr Priority Claim**”).

Third Report, ss. 4.7, MR, Tab 2.

Approval of the Settlement Agreements

12. The Receiver has entered into the Orr Settlement, the Industrial Road Settlement, and the Bridging Assignment, each of which is conditional upon the Court’s approval, which will substantially resolve three major issues concerning the Companies’ estate: (a) the Orr Claim and Orr Priority Claim; (b) the Industrial Road Loan; and (c) the 258 Loan, respectively.

13. The Orr Settlement and Industrial Road Settlement are each settlements of anticipated or ongoing litigation between sophisticated parties that are opposite in interest, each of whom is represented by legal counsel. Each of these settlements will result in a material realization to the estate without the risks, costs, or delays associated with complex and protracted litigation. The Receiver is of the view that each of these settlements is fair and reasonable and represents a desirable outcome for the estate.

Third Report, ss. 4.1-4.12 (Orr Settlement) and ss. 5.1-5.8 (Industrial Road Settlement), MR, Tab 2.

14. The Bridging Assignment will document the terms of an assignment entered into before the appointment of the Receiver and Bridging Receiver (the “**Original Assignment**”), but which was not found to be documented in the books and records of 230 or Bridging as a written agreement.

15. The Bridging Assignment will formalize the Original Assignment and ensure that the interests of Bridging in respect of the 258 Loan are consolidated, and that 230 is released from any of its potential obligations and liabilities in respect of same. Further, and in any event, if the

Original Assignment was not made, or was not valid and enforceable for any reason, the Bridging Assignment would remain a desirable outcome and ought to be pursued by the Receiver because of its positive impact on the estate, namely:

- (a) the Bridging Assignment Agreement provides, among other things, that the Receiver will assign, and the Bridging Receiver will assume, 230's rights and obligations under the 258 Credit Agreement and 258 Security Documents (together, the "**Assigned Documents**"), and the Bridging Receiver will in turn release the Receiver from all of 230's indebtedness and obligations under the Additional Loan;
- (b) in essence, rather than have the Receiver enforce the 258 Loan and remit those proceeds to Bridging in repayment of amounts owing under the Additional Loan, the parties have agreed that it would be more efficient to simply assign 230's rights under the 258 Loan and the 258 Security to the Bridging Receiver so that it can take carriage of any enforcement efforts; and
- (c) the impact to the 230 estate is neutral because the Bridging Receiver has agreed to release its claims against 230 for amounts owing under the Additional Loan.

16. As previously reported, the Receiver has obtained an opinion from its legal counsel that, subject to customary assumptions and qualifications, the security held by Bridging is valid and enforceable.

Third Report, ss. 7.1-7.10, MR, Tab 2.

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

Third Report, s. 13.1, MR, Tab 2.

Approval of Third Report and Receiver's Activities

18. The activities of the Receiver up until September 15, 2023, the date of the Second Report, have already been approved by this Court.

Third Report, ss. 1.5-1.6, MR, Tab 2.

19. On this motion, the Receiver is seeking the approval of its Third Report and the Receiver's conduct and activities described therein, which include, among other things:

- (a) attending the Court hearing held on September 26, 2023, regarding the motion seeking the Approval and Vesting Order and Ancillary Relief Order;
- (b) continuing to carry out the Receiver's duties and responsibilities in accordance with the Appointment Order, including overseeing the Companies' operations and addressing customer and vendor issues until the Closing of the Sale Transaction, and controlling the receipts and disbursements;
- (c) working with its legal counsel to file upon Closing, all necessary amendments, security interests, notices of security interest, registrations and other interests filed in any land registry, land titles or governmental registry system relating to 230's interest in respect of any outstanding loans or accounts receivable that are not Purchased Assets under the APA, and other documents associated with the name change provisions of the APA;
- (d) engaging with the Receiver's legal counsel on various receivership matters;
- (e) managing employee related matters, including convening employee meetings at the Companies' premises, communicating with the employee health benefits provider, issuing termination notices, and preparing and filing T4s;
- (f) attending at the Companies' Premises on a regular basis until the Closing, and as required thereafter;

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- (g) filing and remitting payment for HST (as applicable) and source deductions as required and communicating with CRA and providing documents to CRA in respect of an HST audit;
- (h) attending at a third-party offsite storage facility to review and document certain historical files in storage related to the Consumer Portfolio and to arrange for destruction or retention of same, as appropriate;
- (i) communicating with the Bridging Receiver to provide status updates in respect of these Proceedings;
- (j) monitoring the MVCI/Golden Miles Receivership Proceedings and the Bankruptcy, and liaising with the Mahal Receiver and its legal counsel in respect of status updates on the Mahal Receivership;
- (k) negotiating and drafting each of the Settlement Agreements;
- (l) drafting the Third Report and the motion materials in respect of this motion;
- (m) coordinating the development of and posting of relevant documents to the Case Website;
- (n) responding to enquiries from stakeholders and others; and
- (o) addressing all other matters pertaining to the administration of these Proceedings.

Third Report, s. 10.1, MR, Tab 2.

Approval of Receiver's and Its Counsel's Fees and Disbursements

20. Pursuant to the Ancillary Relief Order, this Court has already approved of the Receiver's and its counsel's fees for the period ending August 31, 2023. On this motion, the Receiver is seeking the approval of the Receiver's and its counsel's fees and disbursements for the period from September 1, 2023 to January 31, 2024 (the "**Period**").

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21. In connection with the exercise of its mandate in these Proceedings, the Receiver incurred fees of \$228,085.50, disbursements of \$1,985.02, and HST thereon of \$29,909.17, for a total of \$259,979.69 during the Period.

Third Report, s. 11.2, MR, Tab 2; Affidavit of Greg Karpel sworn February 13, 2024 (the “Karpel Affidavit”), Appendix “F” to the Third Report, MR, Tab 2.

22. In connection with advice sought by the Receiver and assistance provided in respect of these Proceedings, Fasken incurred fees of \$311,362.00, disbursements of \$2,110.89, and HST thereon of \$40,616.03, for a total of \$354,088.92 during the Period.

Third Report, s. 11.3, MR, Tab 2; Affidavit of Dylan Chochla sworn February 14, 2024 (the “Chochla Affidavit”), Appendix “G” to the Third Report, MR, Tab 2.

23. It is the Receiver’s view that the fees and disbursements of the Receiver and its counsel described in the Karpel Affidavit and the Chochla Affidavit, respectively, are reasonable and appropriate in the circumstances having regard to the scope of activity undertaken in these Proceedings during the Period.

Third Report, s. 11.6, MR, Tab 2.

The Orr Litigation & Responding Production Order

24. Prior to the Appointment Order, Justice Osborne issued an order, among other things, requiring the defendants in the Orr Action to produce certain financial records to the Orr Plaintiffs (the “**Production Order**”).

25. While the Orr Action (and Production Order) and Related Action are stayed as against the Companies as a result of the Appointment Order and will be released as against the Companies pursuant to the Orr Settlement, the underlying litigation in the Orr Action and Related Action against the non-settling defendants will continue.

Third Report, ss. 8.1-8.2, MR, Tab 2.

26. The Receiver and its counsel have engaged with legal counsel for the Orr Plaintiffs to develop the appropriate process for the Receiver to provide the Orr Plaintiffs with certain documents they seek under the Production Order. The Receiver and the Orr Plaintiffs have agreed to the form of the Responding Production Order which provides: (a) that the Receiver will, on a best-efforts basis, provide to the Orr Plaintiffs copies of all 230 and Merk bank statements available to the Receiver for the period from December 1, 2014 to August 31, 2022; and (b) for the lifting of the stay in these Proceedings as it applies to the Orr Plaintiffs for the limited purpose of permitting the relief sought in the Responding Production Order.

Third Report, s. 8.3, MR, Tab 2 and the Responding Production Order, Appendix “E” to the Third Report, MR, Tab 2.

27. The Orr Plaintiffs have brought a separate motion (also returnable on February 22, 2024 at 10:00 am) in respect of the Responding Production Order. The Receiver consents to the substantially all of the relief sought by the Orr Plaintiffs, but takes the position that the Orr Plaintiffs, and not the estate, must be responsible for the reasonable expenses of the Receiver incurred in connection with the Responding Production Order.

Third Report, ss. 8.4-8.7, MR, Tab 2.

PART III - ISSUES

28. This motion raises the following questions:

- (a) Should the Settlement Approval Order approving the Settlement Agreements be granted?
- (b) Should the sealing order be granted in respect of the Confidential Appendices?

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- (c) Should this Court approve the Receiver's activities as described in the Third Report?
- (d) Should this Court approve the Receiver's and its counsel's fees and disbursements as described in the Third Report, the Karpel Affidavit, and the Chochla Affidavit?
- (e) Should this Court order the Orr Plaintiffs to pay the reasonable fees and expenses incurred by the Receiver and its counsel in connection with the Responding Production Order?

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

PART IV - LAW & ARGUMENT

The Settlement Agreements Should be Approved

30. 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.](#)

31. 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.](#)

32. 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 September 22, 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*”).

33. 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.](#)

34. 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

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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.

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

- (a) the Settlement Agreements are commercially reasonable and reflect the merits of each underlying claim as well as the risks and costs associated with litigating those claims;
- (b) the Settlement Agreements resolve complex issues concerning the Orr Claim, the Orr Priority Claim, and the Industrial Road Loan which would otherwise require protracted litigation and the use of significant Court time and resources to resolved;
- (c) the Settlement Agreements will substantially advance these Proceedings and will save significant resources for the benefit of the estate generally;
- (d) the Orr Settlement and Industrial Roads Settlement will each result in material realizations for the estate;
- (e) the Bridging Assignment will formalize and document the Original Assignment which was made by 230 and Bridging before either of those entities were placed into receivership;
- (f) even if the Original Assignment did not occur or was not enforceable for any reason, the Bridging Assignment is still a desirable result because it will consolidate the interests of 230 and Bridging in the 258 Loan and Additional Loan, effectively

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removing 230 as an intermediary, and will streamline any enforcement efforts that may be taken in respect of those loans;

- (g) The Bridging Assignment has no economic impact on the estate because the Bridging Receiver has agreed to release its claims against 230 for amounts owing under the Additional Loan (i.e., the loan provided by Bridging to 230 for the sake of funding the 258 Loan);
- (h) the Bridging Receiver, the senior secured lender of the Companies and likely the sole economic stakeholder in these proceedings, supports and has consented to each of the Settlement Agreements; and
- (i) the Receiver is of the view that the Settlement Agreements are fair and reasonable in all respects and are for the general benefit of the estate.

36. 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:³

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

³ 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 *IWWHL*.

- (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 Settlement Agreements except for one concern raised by the non-settling defendants in the Orr Action and Related Action regarding the Orr Settlement. The Receiver expects that this concern will be resolved consensually with some minor amendments to the Settlement Approval Order.
- (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 favourable results for the benefit of the estate. The Receiver has filed a copy of the Assignment Agreement (Third Report, Appendix "D") and copies of the Orr Settlement, Orr Release, FIJ Settlement Agreement, and FIJ Release (Third Report, Confidential Appendices) for review and approval by this Court.

37. For the foregoing reasons, the Receiver requests that this Court grant the Settlement Approval Order approving the Settlement Agreements.

The Sealing Order Should be Granted

38. The Receiver is seeking an order from this Court sealing the Confidential Appendices (i.e., Appendices "B" and "C" to the Third Report) which are: (a) the Orr Settlement Agreement and Orr Release, and (b) the FIJ Settlement and FIJ Release, respectively.

39. Pursuant to the *Courts of Justice Act* (Ontario), the Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record.

[Courts of Justice Act, R.S.O. 1990, c C. 43, s. 137\(2\).](#)

40. The Supreme Court of Canada has set forth two common law tests for the granting of sealing orders in civil matters.

41. In *Sierra Club of Canada v. Canada (Minister of Finance)*, commonly applied in the insolvency context, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

- (a) 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
- (b) 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.

42. More recently, in *Sherman Estate v. Donovan*, the Supreme Court reiterated that it is a fundamental element of Canadian democracy that court proceedings are open to the public. The Court noted that a person asking the court to exercise discretion in a way that limits the open court presumption must establish the following pre-requisites:

- (a) court openness poses a serious risk to an important public interest (which captures a broad array of public objectives, including commercial interests);
 - (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
 - (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
- Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 30, 38, 41 (“*Sherman Estate*”).

43. In regards to the first pre-requisite, Courts have acknowledged that there is a public interest in the “general commercial interest of preserving confidential information” and in maximizing recoveries in an insolvency, each of which goes beyond the individual’s case.

See [*Sherman Estate, supra*, at para. 41](#); [*Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 84](#).

44. The *Sierra Club* test and the *Sherman Estate* test have both commonly been applied in the insolvency context to authorize sealing orders over confidential or commercially-sensitive documents to protect the interests of debtors or other stakeholders.

See e.g., the Court's application of the *Sierra Club* test in [*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 paras. 32-37](#); [*Stelco Inc., Re*, 2006 CanLII 1772 \(ON SC\)](#); [*Re Canwest Publishing Inc.*, 2010 ONSC 222 at paras. 63-65](#).

See e.g., the Court's application of the *Sherman Estate* test in [*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, BOA, Tab 3](#).

45. The Orr Settlement Agreement and FIJ Settlement Agreement each contain a confidentiality clause which requires that the Receiver hold the terms of each agreement in strict confidence. While the Receiver is permitted to refer to the fact of each settlement in the public record, it may not publicly disclose the terms of those agreements.

Third Report, s. 13.1(j), MR, Tab 2.

46. The Confidential Appendices contain commercially-sensitive information about the Orr Plaintiffs and Damages Counsel and other interested parties. If the sealing order is not granted, the release of this information:

- (a) will negatively impact the Orr Plaintiffs and Damages Counsel and will likely prejudice their respective economic and commercial interests;
- (b) will likely compromise the settlements entered into with the Orr Plaintiffs and Damages Counsel as each of those agreements contain a robust confidentiality clause which is material to those parties; and

(c) will undermine the public interest in promoting settlements.

47. The Receiver is not aware of any party that will be prejudiced if the Confidential Appendices are sealed on the terms requested. The Receiver notes that the Orr Settlement may be disclosed on a limited basis to the non-settling defendants in the Orr Action and Related Action to prevent any procedural unfairness which might otherwise arise.

Third Report, ss. 13.1(j)-(o), MR, Tab 2.

48. The sealing order sought is the least restrictive means to maintain the confidentiality of the commercially-sensitive and confidential information found in the Confidential Appendices while allowing the Court to review the agreements contained therein for the sake of the settlement approval motion.

49. Further, the sealing order will preserve the integrity of the confidentiality provisions negotiated by the Orr Parties and Damages Counsel and support the public interest in favouring settlements, which greatly outweighs any negative effects that will result from limiting public access to the Confidential Appendices.

50. Given the foregoing, the Receiver respectfully submits that the proposed sealing order satisfies both the tests in *Sierra Club* and *Sherman Estate* and that it is therefore appropriate for this Court to grant the sealing order, subject to further order of this Court.

The Activities of the Receiver as described in the Third Report Should be Approved

51. 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 4; [aff'd \[1996\] O.J. No. 2806 \(C.A.\)](#); [Lang Michener v. American Bullion Minerals Ltd.](#), 2005 BCSC 684 at para. 21.

52. 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.](#)

53. 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.](#)

54. All of the Receiver's activities, as set out in the Third 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 Third Report and the activities of the Receiver described therein should be approved.

The Fees of the Receiver and its Counsel Should be Approved

55. Pursuant to the Appointment Order, the Receiver and its legal counsel are entitled to be paid their reasonable fees and disbursements, and are required to pass their accounts from time to time.

56. In *Confectionately Yours Inc. (Re)*, the Court summarized the requirements for the substance or content of the accounts:

- (a) the accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged, and the total charges for each of the categories of services rendered;
- (b) the accounts should be in a form that can be easily understood by those affected by the receivership so that such person can determine the amount of time spent by the receiver's employees (and others the receiver may have hired) with respect to the various discrete aspects of the receivership; and
- (c) the receiver's accounts and solicitor's accounts should be verified by affidavit.
[*Confectionately Yours Inc. \(Re\)*, 2002 CanLII 45049 \(ON CA\) at paras. 37-38.](#)

57. The accounts of the Receiver and its counsel, Fasken, meet each of these requirements.

58. The general standard of review for the accounts of a court-appointed receiver is “whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable.”

[*Confectionately Yours Inc. \(Re\)*, \[2002\] O.J. No. 3569 \(C.A.\) at para. 42 \(“*Confectionately Yours O.J.*”\).](#)

59. The Court is to consider all of the relevant factors in a holistic manner and need not examine “dockets, hours, explanations, or disbursements line by line.” The focus on such a review should be the fair and reasonable assessment of what was accomplished, not the time it took.

Bank of Nova Scotia v Diemer, 2014 ONSC 365 at para. 19; *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para. 45 (“*Diemer*”).

60. The Ontario Court of Appeal has endorsed a non-exhaustive list of factors to be considered in determining whether a receiver’s fees are fair and reasonable, including: (a) the nature and extent of the value of the assets handled; (b) the complications and difficulties encountered; (c) the degree of assistance provided by the company, its officers, or its employees; (d) the time spent; (e) the receiver’s knowledge, experience, and skill; (f) the diligence and thoroughness displayed by the receiver; (g) the responsibilities assumed; (h) results of the receiver’s efforts; and (i) the cost of comparable services.

Federal Business Development Bank v Belyea and Fowler, 1983 CanLII 4086 (NB CA) at para. 9; *Diemer, supra*, at para. 33; *Confectionately Yours O.J., supra* at paras. 45-46.

61. A&M is a specialized licensed insolvency trustee, and has staffed this matter with insolvency specialists at various levels of seniority. Likewise, Fasken is a sophisticated full-service law firm, which has staffed this matter with subject matter experts, including insolvency experts, at various levels of seniority. A&M’s and Fasken’s hourly rates are consistent with the rates charged by comparable firms practicing in the area of insolvency in the Toronto market and the Receiver is of the view that A&M’s and Fasken’s fees and disbursements are reasonable and appropriate in the circumstances.

Third Report, s. 11.6, MR, Tab 2.

62. Accordingly, the Receiver respectfully requests approval of its fees and the fees of its legal counsel, Fasken, during the applicable Period as set out in the Karpel Affidavit and the Chochla Affidavit.

Karpel Affidavit, Appendix “F” to the Third Report, MR, Tab 2; Chochla Affidavit, Appendix “G” to the Second Report, MR, Tab 2.

The Orr Plaintiffs Should Bear the Cost of Document Production

63. While the Receiver has consented to the bulk of the relief sought by the Orr Plaintiffs in the Responding Production Order, it has not agreed to bear the cost of complying with that Order. The Receiver respectfully submits that the Orr Plaintiffs should be responsible for paying those costs for the following reasons:

- (a) the Orr Action (and Production Order) and the Related Action are stayed as against the Companies;
- (b) the relief sought by the Orr Plaintiffs pursuant to the Responding Production Order is for the sole benefit of the Orr Plaintiffs and does not stand to benefit any other stakeholder in these Proceedings;
- (c) in what appears to be the only reported decision on this issue, *Thomson Kernaghan & Co., Re*, this Court ordered that a trustee in bankruptcy be indemnified for the costs of complying with a U.S. document production order because the estate would not derive any direct benefit from the litigation in which the documents were to be produced; and
- (d) given the circumstances, it is more appropriate for the Orr Plaintiffs to cover the reasonable costs of obtaining the documents to be produced in accordance with the Responding Production Order, and to claim those costs against the non-settling defendants in the event that they are successful in advancing those claims.

***Thomson Kernaghan & Co., Re*, [2003] O.J. No. 2011 at paras. 15-18 (S.C.J., per Lederman J.), BOA, Tab 5.**

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64. For these reasons, the Receiver respectfully requests that this Court grant the Responding Production Order in the form proposed by the Receiver, which provides for the payment of the Receiver's and its counsel's reasonable fees and disbursements incurred in connection with that Order.

PART V - ORDER REQUESTED

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

- (a) grant the Settlement Approval Order approving and effecting the Settlement Agreements;
- (b) seal the Confidential Appendices, subject to further order of this Court;
- (c) approve the Third Report and the Receiver's conduct and activities described therein;
- (d) approve the fees and disbursements of the Receiver and its counsel;
- (e) abridge and validate the time for service of the Notice of Motion and the Motion Record, and dispense with further service thereof; and
- (f) grant the Responding Production Order in the form proposed by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February, 2024.

Per: Fasken Martineau DuMoulin LLP
Fasken Martineau DuMoulin LLP

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FASKEN MARTINEAU DuMOULIN LLP

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6
Fax: 416 364 7813

Dylan Chochla (LSO: 62137I)

dchochla@fasken.com
Tel: 416 868 3425

Mitch Stephenson (LSO: 73064H)

mstephenson@fasken.com
Tel: 416 868 3502

Montana Licari (LSO: 85097G)

mlicari@fasken.com
Tel: 416 868 3450

Lawyers for the Receiver, Alvarez & Marsal
Canada Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

66. [*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37](#)
67. [*Maple Bank GmbH, Re*, 2016 ONSC 7218](#)
68. [*Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*,
2013 ONSC 1078](#)
69. [*Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647](#)
70. [*Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 \(ON CA\)](#)
71. *Bakemates International Inc., Re*, [2003] O.J. No. 3191 [See BOA]
72. [*Bakemates International Inc. v Marmac Holdings Inc.*, 2004 CanLII 59994 \(ON
CA\)](#)
73. *Ravelston Corp., Re* (2005), 142 A.C.W.S. (3d) 18 [See BOA]
74. [*IWHL Inc., Re*, 2011 ONSC 5672](#)
75. [*Nortel Networks Corp., Re*, 2010 ONSC 1096](#)
76. [*Crown Trust Co. et al. v Rosenberg et al.*, 1986 CanLII 2760 \(ON SC\)](#)
77. [*Sierra Club of Canada v Canada \(Minister of Finance\)*, 2002 SCC 41](#)
78. [*Sherman Estate v Donovan*, 2021 SCC 25](#)
79. [*Danier Leather Inc., Re*, 2016 ONSC 1044](#)

80. [*Elleway Acquisitions Ltd v 4358376 Canada Inc.*, 2013 ONSC 7009](#)
81. [*GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc.*, 2014 ONSC 1173](#)
82. [*Stelco Inc., Re*, 2006 CanLII 1772 \(ON SC\)](#)
83. [*Re Canwest Publishing Inc.*, 2010 ONSC 222](#)
84. [*Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347](#)
85. *Laurentian University of Sudbury*, 2021 ONSC 4769 [See BOA]
86. *Bank of America Canada v Willann Investments Ltd.*, [1993] O.J. No. 1647 (O.C.J. Gen. Div.) [See BOA]
87. [*Bank of America Canada v Willann Investments Ltd.*, 1996 CanLII 2782 \(ON CA\)](#)
88. [*Lang Michener v American Bullion Minerals Ltd.*, 2005 BCSC 684](#)
89. [*Target Canada Co., \(Re\)*, 2015 ONSC 7574](#)
90. [*Hangfen Evergreen Inc., \(Re\)* 2017 ONSC 7161](#)
91. [*Confectionately Yours Inc. \(Re\)*, 2002 CanLII 45049 \(ON CA\)](#)
92. [*Bank of Nova Scotia v Diemer*, 2014 ONSC 365](#)
93. [*Bank of Nova Scotia v Diemer*, 2014 ONCA 851](#)

94. [*Federal Business Development Bank v Belyea and Fowler*, 1983 CanLII 4086 \(NB CA\)](#)
95. *Thomson Kernaghan & Co., Re*, [2003] O.J. No. 2011 [See BOA]

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Courts of Justice Act, R.S.O. 1990, c C. 43

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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. et al.

Respondents

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

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

Proceeding commenced at Toronto

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

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)

mstephenson@fasken.com
Tel: 416 868 3502

Montana Licari (LSO: 85097G)

mlicari@fasken.com
Tel: 416 868 3450

Lawyers for the Receiver,
Alvarez & Marsal Canada Inc.