

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

B E T W E E N:

**BRIDGING FINANCE INC. AS AGENT**

Applicant

- and -

**AUDIBLE CAPITAL CORP.,  
AVENIR TRADING CORP., 1892244 ALBERTA LTD.,  
AVENIR SPORTS ENTERTAINMENT LTD.,  
AVENIR SPORTS ENTERTAINMENT CORP. and  
PORTLAND WINTER HAWKS, INC.**

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED

**FACTUM OF THE RECEIVER**

December 14, 2020

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solely in its capacity as Court-  
appointed Receiver and not in its  
personal capacity

## FACTUM OF THE RECEIVER

### PART I: OVERVIEW

1. On May 7, 2020, pursuant to an order of this Court (the "**Receivership Order**"), KSV Restructuring Inc.<sup>1</sup> was appointed receiver (the "**Receiver**") of Audible Capital Corp., Avenir Trading Corp., 1892244 Alberta Ltd., Avenir Sports Entertainment Ltd., Avenir Sports Entertainment Corp. and Portland Winter Hawks, Inc. ("**PWH**") (collectively, the "**Companies**").
2. On May 7, 2020, the Receiver, as foreign representative of the Companies, applied to the U.S. Bankruptcy Court for the District of Oregon (the "**U.S. Court**") seeking recognition of these proceedings (the "**Receivership Proceedings**"). On that same day, the US Court issued an order granting certain provisional relief, and on June 9, 2020, the US Court granted an order recognizing the Receivership Proceedings.
3. The Companies' principal asset is the Portland Winterhawks franchise (the "**Winterhawks**"), a junior ice hockey team based in Portland, Oregon. The primary purpose of the Receivership Proceedings is to allow the Companies to continue to operate while a sale process for the Winterhawks is carried out by the Receiver (the "**Sale Process**").
4. On June 2, 2020, the Court granted an order (the "**Sale Process Order**") approving, among other things, the Sale Process. On June 11, 2020, the US Court entered an order recognizing the Sale Process Order.
5. The Receiver has conducted the Sale Process in accordance with the Sale Process Order. The Receiver brings this motion seeking to approve the APA (as defined below) and to vest the

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<sup>1</sup> Effective August 30, 2020 KSV Kofman Inc. changed its name to KSV Restructuring Inc.

assets described in the APA (the "**Purchased Assets**") in Winterhawks Sports Group LLC (the "**Purchaser**") and certain affiliated entities free and clear of all claims and encumbrances except as provided in the APA (the "**Transaction**").

## **PART II: FACTS**

6. The facts underlying these proceedings are more fully set out in the First Report of the Monitor dated May 26, 2020 (the "**First Report**") and the Second Report of the Monitor dated September 21, 2020. For this motion, the Receiver is relying upon the Third Report of the Receiver dated December 9, 2020 (the "**Third Report**").

7. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Third Report.

### **B. The Companies**

8. Audible is a holding company wholly-owned by William Gallacher. A corporate organization chart is contained within the First Report. Audible is the direct parent company of three (3) Alberta corporations, one of which is the parent company of a Nevada corporation. That Nevada corporation is the parent company of PWH, which owns the Winterhawks.<sup>2</sup>

9. The Companies' senior secured creditor is Bridging Finance Inc. ("**Bridging**"), which is currently owed approximately \$22 million. The only other known secured creditors are: (i) Bank of Montreal ("**BMO**"); (ii) Ford Credit Canada Leasing ("**Ford**"); and (iii) Travelers Finance Ltd. ("**Travelers**"). Based on the Companies' records, no amounts are owing to BMO, the debt owing

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<sup>2</sup> Third Report of the Receiver KSV Restructuring Inc. dated December 9, 2020 at section 2.0 paras 1-3 [Third Report].

to Ford relates to a 2018 Ford Escape and the debt owing to Travelers relates to a 1998 Sikorsky Aircraft. The Companies no longer own either of these assets.<sup>3</sup>

### C. The Sale Process and the Transaction

10. As previously noted, the principal asset of the Companies, the Winterhawks, is a junior ice hockey team based in Portland, Oregon that plays in the Western Hockey League (the "**WHL**"). According to the WHL's By-Laws, the approval of the WHL's Board of Governors (the "**Board**") is required for the sale of the Winterhawks.<sup>4</sup>

11. The Sale Process provided for, *inter alia*, a bid deadline of June 30, 2020 (the "**Bid Deadline**").<sup>5</sup> Six (6) offers were submitted at the Bid Deadline. Each of the offers received contained diligence and/or financing conditions. All interested parties advised the Receiver that the COVID-19 pandemic affected the conditionality and value of their offers.<sup>6</sup>

12. The Receiver invited the three (3) parties with the best offers to participate in a second round of bidding (the "**Second Round**"). Second Round offers were due on or before July 7, 2020 (the "**Second Round Bid Deadline**"). Only one party submitted an offer on or prior to the Second Round Bid Deadline, however, the Receiver could not come to an agreement with that party.<sup>7</sup>

13. Following the Second Round Bid Deadline and the inability to come to any formal agreement to consummate a transaction, the Receiver retained a broker - 2056684 Alberta Ltd (the "**Broker**") - with previous experience selling WHL teams to assist with the Sale Process.<sup>8</sup>

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<sup>3</sup> *Ibid* at section 2.0 para 5.

<sup>4</sup> *Ibid* at section 1.0 at para 4.

<sup>5</sup> *Ibid* at section 3 at para 1.

<sup>6</sup> *Ibid* at section 3.1 at paras 1-2.

<sup>7</sup> *Ibid* at section 3.1 at paras 3-5.

<sup>8</sup> *Ibid* at section 3.1 at para 6.

14. The Receiver, in addition to the efforts of the Broker, continued to market the Winterhawks in accordance with the Sale Process Order. On September 17, 2020, the Receiver was contacted by the Purchaser and on September 23, 2020, the Receiver executed a non-binding letter of intent with the Purchaser (the "**LOI**"). The LOI was conditional on the Purchaser's diligence.

15. On October 23, 2020, the Purchaser completed its diligence and the asset purchase agreement (the "**APA**") was executed. The salient terms and features of the APA are described in detail in the Third Report.<sup>9</sup>

16. Other than approval by the Court and the US Court, the APA was subject to two (2) other material conditions, being (i) WHL approval, and (ii) a new lease for the Winterhawks' practice facility (the "**Conditions**"). The Conditions have been either satisfied or waived.<sup>10</sup>

17. The Receiver is also seeking to seal the summary of all the offers received in the Sale Process (the "**Offer Summary**"), found at Confidential Appendix "1" of the Third Report.

### **PART III: ISSUES**

18. The issues addressed in this Factum are whether:

- (a) the Approval and Vesting Order should be granted; and
- (b) the Court should seal the Offer Summary pending further order of the Court.

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<sup>9</sup> *Ibid* at section 3.1 at para 8.

<sup>10</sup> *Ibid* at section 3.1 at para 10.

## PART IV: LAW AND ARGUMENT

### A. The Approval and Vesting Order

#### 1. The Transaction Should be Approved

19. Section 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended, authorizes this Court to grant an order vesting “in any person an interest in real or personal property that the Court has authority to order be conveyed”.<sup>11</sup> Similarly, section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (“BIA”), vests this Court with jurisdiction to “grant a vesting order vesting property in a purchaser”.<sup>12</sup>

20. The principles to be applied when determining whether to approve a sale transaction are well known to this Court and were articulated by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.* (“*Soundair*”):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.<sup>13</sup>

21. The proposed Transaction satisfies the *Soundair* principles given that:

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<sup>11</sup> *Courts of Justice Act*, RSO 1990, c. C.43 s 100 [CJA]; *Elleway Acquisitions Limited v 4358376 Canada Inc.*, 2013 ONSC 7009 at para 30 [Elleway].

<sup>12</sup> *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para 87 [Third Eye]; *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 s 243(1).

<sup>13</sup> *Royal Bank of Canada v Soundair Corp.*, [1991] 46 OAC 321 at para 16 [Soundair]; Elleway *supra* note 11 at para 31; *Home Trust Co v 2122775 Ontario Inc.*, 2014 ONSC 1039 at para 11; *Romspen Investment Corp v 6176666 Canada Ltée*, 2012 ONSC 1727 at para 18 [Romspen].

- (a) the Court-approved Sale Process was conducted by the Receiver in accordance with the Sale Process Order and provided for a fair, transparent and thorough canvassing of the market for the Purchased Assets over a reasonable amount of time;
- (b) the APA is the highest and best offer obtained for the Purchased Assets through the Sale Process;
- (c) notwithstanding a thorough marketing process, no other reasonable offers for the Purchased Assets were received and no party has indicated that such an offer would be forthcoming if a further extension of time were provided under the Sale Process;
- (d) the Transaction provides for the continuation of the Winterhawks' operations with a closing before the season is scheduled to resume;
- (e) the Transaction is acceptable to the WHL and has been approved by the Board;
- (f) the Receiver believes that the approval of the APA and the Transaction contemplated thereby is in the best interests of PWH, the Companies and all of their stakeholders, including, among other others, its principal secured creditor Bridging; and
- (g) Bridging is supportive of the Transaction.<sup>14</sup>

## **2. The Court has Jurisdiction to Grant the Approval and Vesting Order**

22. In *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.* (“**Third Eye**”), the Ontario Court of Appeal clarified that a court’s jurisdiction under section 243(1) of the BIA to authorize a receiver to “take any other action that the court considers advisable” includes

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<sup>14</sup> Third Report, *supra* note 2 at section 4.1 at para 1.

the authority to grant a vesting order vesting property in a purchaser free and clear of encumbrances and extinguishing liabilities.<sup>15</sup>

23. In granting approval and vesting orders courts have made clear that the recommendation of the Court-appointed receiver in respect of the proposed sale transaction should only be ignored in exceptional circumstances.<sup>16</sup>

#### **B. The Ancillary Order - Sealing**

24. The Receiver requests that the Court seal the Offer Summary, found at Confidential Appendix "1" of the Third Report, pending further order of the Court. The Offer Summary contains commercially sensitive information, which may negatively impact realizations on the Purchased Assets if the Transaction does not close for any reason.<sup>17</sup>

25. Pursuant to section 137 of the Ontario *Courts of Justice Act*, this Court has the discretion to order any document filed in a civil proceeding be treated as confidential and sealed and not form part of the public record.<sup>18</sup>

26. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Justice Iacobucci held that a sealing order should be granted where:

- a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.<sup>19</sup>

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<sup>15</sup> *Third Eye*, *supra* note 12 at para 87.

<sup>16</sup> *Soundair*, *supra* note 13 at para 58; *Romspen*, *supra* note 13 at para 18.

<sup>17</sup> Third Report, *supra* note 2 at section 3.1 at para 11.

<sup>18</sup> *CJA*, *supra* note 11 at s.137(2)

<sup>19</sup> *Sierra Club of Canada v. Canada (Minister of Finance)* (2002) 2 S.C.R. 522 at para 53.



27. Sealing the Offer Summary is an important commercial interest that should be protected. The salutary effects of sealing the Offer Summary – namely the protection of commercially sensitive information that could negatively affect the value of the Purchased Assets if the Transaction does not close – outweigh any deleterious effect of restricting the accessibility of certain information.

28. The Receiver believes that the proposed sealing order is appropriate in the circumstances and is not aware of any party that will be prejudiced if the Offer Summary does not form part of the public record.<sup>20</sup>

29. The Receiver further notes that similar documents are routinely sealed by this Court in similar contexts.

**PART V: RELIEF REQUESTED**

30. The Receiver requests that this Court grant the proposed form of Approval and Vesting Order and Ancillary Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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December 14, 2020

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<sup>20</sup> Third Report, *supra* note 2 at section 3.1 para 11.

## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. [\*Elleway Acquisitions Limited v 4358376 Canada Inc\*, 2013 ONSC 7009](#)
2. [\*Home Trust Co v 2122775 Ontario Inc\*, 2014 ONSC 1039](#)
3. [\*Romspen Investment Corp v 6176666 Canada Ltée\*, 2012 ONSC 1727](#)
4. [\*Royal Bank of Canada v Soundair Corp\*, \[1991\] 46 OAC 321](#)
5. [\*Sierra Club of Canada v. Canada \(Minister of Finance\)\* \(2002\) 2 S.C.R. 522](#)
6. [\*Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc\*, 2019 ONCA 508](#)

## SCHEDULE B – STATUTES RELIED ON

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

#### **Section 243**

##### **Court may appoint receiver**

(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.

##### **Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

##### **Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

**Definition of receiver — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of disbursements**

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

**Courts of Justice Act, R.S.O. 1990, c. C.43****Section 100****Vesting Orders**

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

**Section 137****Documents Public**

(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

**Sealing documents**

(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.

**Court lists public**

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

**Copies**

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

**BRIDGING FINANCE INC., AS AGENT**

-and-

**AUDIBLE CAPITAL CORP. *et al***

Applicant

Respondents

Court File No.: CV-20-00640212-00CL

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

Proceedings commenced in Toronto

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**FACTUM OF THE RECEIVER**

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