

**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**

March 11, 2021

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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 (the "**Receivership Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), KSV Restructuring Inc.<sup>1</sup> was appointed receiver (the "**Receiver**") of Audible Capital Corp. ("**Audible**"), Avenir Trading Corp., 1892244 Alberta Ltd., Avenir Sports Entertainment Ltd., Avenir Sports Entertainment Corp. and Portland Winter Hawks, Inc. (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 "**US 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. Audible holds several investments in start-up or growth stage companies (collectively, the "**Investments**"). On October 23, 2020, the Receiver was presented with an unsolicited offer from Avina Acquisition Corp. ("**Avina**") to purchase the Investments, other than Audible's interests in Orla Mining Ltd. ("**Orla**").

4. In an effort to maximize value for creditors while minimizing the risk of losing the offer, the Receiver proposed that Avina allow the offer to act as a "stalking horse" in a Court-supervised sale process (the "**Investment Sale Process**"). Avina agreed to participate as the stalking horse bidder in the Investment Sale Process and the Receiver and Avina negotiated and entered into an

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

Asset Purchase Agreement dated December 15, 2020, as amended (the "**APA**") for all of the Receiver and Audible's right, title and interest in and to the assets described in the APA (the "**Purchased Assets**").

5. On January 6, 2021, the Court issued an order (the "**Investment Sale Process Order**") which, *inter alia*, approved the Investment Sale Process.

6. Following service of the motion in respect of the Investment Sale Process Order and a series of exchanges with the majority partners of EdgeHill Partners ("**EdgeHill**"), one of the entities that comprise the Investments, and after consultation with Avina and the Companies' senior secured creditor Bridging Finance Inc. ("**Bridging**"), the Receiver and EdgeHill negotiated and entered into the Asset Purchase Agreement dated March 8, 2021 (the "**EdgeHill APA**") for all of the Receiver and Audible's right, title and interest in and to the assets described in the EdgeHill APA (the "**Units**").

7. In light of the EdgeHill APA, certain amendments to the APA were necessary. On March 8, 2021, the Receiver and Avina entered into an amendment to the APA (the "**Amendment Agreement**") which, among other things, removed the Units as a "Purchased Asset" under the APA.

8. The Receiver has conducted the Investment Sale Process in accordance with the Investment Sale Process Order, and the APA remains the highest and best bid. The Receiver brings this motion seeking to approve the APA and the EdgeHill APA and to vest the Units and the Purchased Assets in Avina and EdgeHill, respectively, free and clear of all claims and encumbrances except as provided in the APA and the EdgeHill APA (together, the "**Transactions**").

## **PART II: FACTS**

9. The facts underlying these proceedings are more fully set out in the First Report of the Receiver dated May 26, 2020 and the Fourth Report of the Receiver dated December 22, 2020 (the "**Fourth Report**"). For this motion, the Receiver is relying upon the Fifth Report of the Receiver dated March 9, 2021 (the "**Fifth Report**").

10. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Fifth Report.

### **B. The Companies**

11. Audible is a holding company wholly-owned by William Gallacher. A corporate organization chart is contained within the Fifth Report.<sup>2</sup>

12. The Companies' senior secured creditor, Bridging, is currently owed approximately \$15 million.<sup>3</sup>

### **C. The PWH Sale Process and the PWH Transaction**

13. The Companies' principal asset was the Portland Winterhawks franchise (the "**Winterhawks**"), a junior ice hockey team based in Portland, Oregon that plays in the Western Hockey League. On June 2, 2020, the Court issued an order which, *inter alia*, approved a Court-supervised sale process in respect of the Winterhawks (the "**PWH Sale Process**").<sup>4</sup>

14. As a result of the PWH Sale Process and certain additional efforts of the Receiver, the Court and the US Court each granted an order which, *inter alia*, approved the transaction (the

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<sup>2</sup> Fifth Report of the Receiver KSV Restructuring Inc. dated March 9, 2021 at section 2.0 paras 1-2 [Fifth Report].

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

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

"PWH Transaction") contemplated by the Asset Purchase Agreement dated October 23, 2020, as amended, between Winterhawks Sports Group LLC, as purchaser, and the Receiver, Avenue Ice Sports LLC and Winterhawks Junior Hockey LLC, as vendors on December 16, 2020 and December 18, 2020, respectively.<sup>5</sup>

15. The PWH Transaction closed on December 31, 2020.<sup>6</sup>

#### **D. The Investment Sale Process and the Transactions**

##### *(i) the Investment Sale Process*

16. The Investment Sale Process provided for, *inter alia*, a bid deadline of February 4, 2021 (the "**Bid Deadline**"), approximately four (4) weeks after the issuance of the Investment Sale Process Order.<sup>7</sup>

17. In accordance with the Investment Sale Process Order, the Receiver conducted the Investment Sale Process which, *inter alia*, included:

- (a) uploading certain information received from the principals of the entities comprising the Purchased Assets, including securities registers and shareholder agreements, to a virtual data room;
- (b) distributing an interest solicitation letter to prospective purchasers detailing the acquisition opportunity and enclosing a form of confidentiality agreement ("**CA**");
- (c) facilitating information requests by prospective purchasers; and

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<sup>5</sup> *Ibid* at section 1.0 para 4

<sup>6</sup> *Ibid* at section 1.0 para 4

<sup>7</sup> *Ibid* at section 3.0 at para 3.

(d) arranging for the Investment Sale Process to be advertised in the Globe & Mail.<sup>8</sup>

18. Prior to the Bid Deadline, 12 parties executed the CA, however, no offers were received other than the APA.<sup>9</sup>

**(ii) the EdgeHill APA**

19. Following service of the motion in respect of the Investment Sale Process Order, the Receiver was contacted by counsel to the majority partners of EdgeHill, one of the entities that comprise the Investments. While the majority partners of EdgeHill did not object to the Investment Sale Process or the Investment Sale Process Order, they reserved their rights in respect of same. Further, they appeared at the motion for the Investment Sale Process Order and advised the Court of their position.<sup>10</sup>

20. The Receiver and the majority partners of EdgeHill had a series of exchanges which, following consultation with Avina and the Bridging, culminated in the EdgeHill APA. The key terms and conditions of the EdgeHill APA are provided in the Fifth Report.<sup>11</sup>

**(iii) the APA**

21. In connection with the EdgeHill APA, certain amendments to the APA were necessary. On March 8, 2021, the Receiver and Avina entered into an amendment to the APA (the "**Amendment Agreement**") which, among other things:

(a) removed the Units as a "Purchased Asset" under the APA;

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<sup>8</sup> *Ibid* at section 3.0 paras 1-2.

<sup>9</sup> *Ibid* at section 3.1 para 1.

<sup>10</sup> *Ibid* at section 3.2 para 1.

<sup>11</sup> *Ibid* at section 3.2 paras 2-4

- (b) amended the definition of "Outside Date" to be March 31, 2021; and
- (c) reduced the purchase price by \$250,000 (i.e., from \$4,650,000 to \$4,400,000). The \$250,000 purchase price reduction is equal to the purchase price in the EdgeHill APA.<sup>12</sup>

22. The key terms and conditions of the APA prior and following the Amendment Agreement were summarized in the Fourth Report and the Fifth Report, respectively.<sup>13</sup>

### **PART III: ISSUES**

23. The sole issue addressed in this factum is whether the EdgeHill Approval and Vesting Order and the Avina Approval and Vesting Order (together, the "**Approval and Vesting Orders**") should be granted.

### **PART IV: LAW AND ARGUMENT**

#### **A. The Approval and Vesting Orders**

##### **1. The Transactions Should be Approved**

24. 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>14</sup> Similarly, subsection 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>15</sup>

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<sup>12</sup> *Ibid* at section 4.1 para 1.

<sup>13</sup> *Ibid* at section 4.2 para 2.

<sup>14</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>15</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\(1\)](#).

25. 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>16</sup>

26. The proposed Transactions satisfy the *Soundair* principles given that:

- (a) the Court-approved Investment Sale Process was conducted by the Receiver in accordance with the Investment Sale Process Order and provided for a fair, transparent and thorough canvassing of the market for the Purchased Assets and the Units over a reasonable amount of time;
- (b) the APA and the EdgeHill APA are together the highest and best offer obtained for the Purchased Assets and Units through the Investment Sale Process;
- (c) notwithstanding a thorough marketing process, no other offers for the Purchased Assets and the Units were received and no party has indicated that such an offer would be forthcoming if a further extension of time were provided under the Investment Sale Process;

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<sup>16</sup> [Royal Bank of Canada v Soundair Corp.](#), [1991] 46 OAC 321 at para 16 [*Soundair*]; [Elleway](#) 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*].



- (d) the Receiver believes that the approval of the APA and the EdgeHill APA and the Transactions contemplated thereunder are in the best interests of Audible, the Companies and all of their stakeholders, including, among other others, its principal secured creditor Bridging; and
- (e) Bridging is supportive of the Transactions.<sup>17</sup>

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

27. 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 subsection 243(1) of the BIA to authorize a receiver to "take any other action that the court considers advisable" includes the authority to grant a vesting order vesting property in a purchaser free and clear of encumbrances and extinguishing liabilities.<sup>18</sup>

28. 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>19</sup>

## PART V: RELIEF REQUESTED

29. The Receiver requests that this Court grant the proposed form of the Avina Approval and Vesting Order and the EdgeHill Approval and Vesting Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*Bennett Jones LLP*

March 11, 2021

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<sup>17</sup> Fifth Report, *supra* note 2 at section 4.3 para 1 and at section 8 para 1.

<sup>18</sup> *Third Eye*, *supra* note 9 at para 87.

<sup>19</sup> *Soundair*, *supra* note 15 at para 58; *Romspen*, *supra* note 15 at para 18.

## 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. [\*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.

**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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