

**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 WINTERHAWKS, 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**

May 26, 2020

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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 Kofman Inc. 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 that same day, 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 recognition hearing is scheduled to be heard by the U.S. Court on June 9, 2020. However, on May 7, 2020, the U.S. Court provisionally granted certain relief in respect of the Companies, including a stay of proceedings.
3. The Companies' principal asset is the Portland Winterhawks franchise, a junior ice hockey team based in Portland, Oregon. The primary purpose of these proceedings is to allow the Companies to continue to operate while a sale process for that asset is carried out by the Receiver. As such, the Receiver brings this motion for an order approving the proposed sale process (the "**Sale Process**").
4. In addition, the Receiver is seeking *nunc pro tunc* approval of a sale transaction, and the associated distribution, of another hockey team, the Lausanne Hockey Club, that was scheduled to close prior to the Receivership Order, but in fact closed two days after the Receivership Order, on May 9, 2020 (the "**Lausanne Transaction**").

## **PART II:       FACTS**

### **A.     The Companies**

5.     Audible is a holding company wholly-owned by William Gallacher. A corporate organization chart is contained within the First Report of the Receiver dated May 26, 2020 (the "**First Report**"). Audible is the direct parent company of three Alberta corporations, one of which is the parent company of a Nevada corporation. That Nevada corporation is the parent company of Portland Winter Hawks, Inc. ("**PWH**"), which owns the Portland Winterhawks franchise.<sup>1</sup>

6.     The Companies' senior secured creditor is Bridging Finance Inc. ("**Bridging**"), which was owed approximately \$20.5 million as of the date of the Receivership Order. The only other known secured creditors are: (i) Bank of Montreal (to which no amounts are owing according to the Companies' book and records); (ii) Ford Credit Canada Leasing (for which the debt owing relates to a 2018 Ford Escape); and (iii) Travelers Finance Ltd. (for which the debt owing relates to a 1998 Sikorsky Aircraft).

7.     According to Audible's books and records, its unsecured creditors are collectively owed approximately \$1 million.<sup>2</sup> The other Companies have additional unsecured creditors.

### **B.     The Proposed Sale Process**

8.     The principal asset of the Companies, the Portland Winterhawks franchise, is a junior ice hockey team based in Portland, Oregon that plays in the Western Hockey League (the "**WHL**").

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<sup>1</sup> First Report of the Receiver KSV Kofman Inc. dated May 26, 2020 at paras 2.0(1) [First Report].

<sup>2</sup> *Ibid* at paras 2.0(2)-(3), 4.0(6).

According to the WHL's By-Laws, the approval of the WHL's Board of Governors is required for the sale of the Portland Winterhawks. The WHL is supportive of the Sale Process.<sup>3</sup>

9. Pursuant to the proposed Sale Process, the Receiver will offer prospective purchasers the opportunity to purchase the shares of PWH or the business and assets owned by PWH.<sup>4</sup>

10. A detailed outline of the Sale Process can be found in the First Report. The Sale Process includes the preparation and distribution of marketing materials to prospective buyers, the maintenance of an online data room, and the solicitation of potential buyers. It also contemplates measures to accommodate the current COVID-19 pandemic, such as virtual meetings if necessary.<sup>5</sup>

11. The Sale Process has an offer deadline of June 30, 2020. Subsequent to the offer deadline, the Receiver may invite certain parties to participate in further rounds of bidding prior to selecting the successful bidder, in consultation with the WHL and Bridging.<sup>6</sup>

12. As required by the WHL, the WHL will have two weeks to perform final diligence and the successful bidder will be required to pay WHL a non-refundable \$50,000 diligence fee.<sup>7</sup>

13. The Sale Process provides that the Receiver has the right to reject all offers, and the right to extend the Sale Process in its discretion, subject to consultation with the WHL and Bridging. Any transaction is subject to approval by this Court and the U.S. Court.<sup>8</sup>

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<sup>3</sup> *Ibid* at paras 1.0(4), 3.0(1).

<sup>4</sup> *Ibid* at para 3.0(2).

<sup>5</sup> *Ibid* at para 3.0(4).

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* at para 3.0(5).

14. The Sale Process is expected to span approximately nine weeks and has already commenced with the preparation of marketing materials. The timeline is important so that a buyer can be found prior to the upcoming hockey season.<sup>9</sup>

### **C. The Lausanne Transaction**

15. Pursuant to a share purchase agreement dated April 29, 2020, the shares of Swiss Entertainment Company (a Switzerland company) were sold by Audible to Petr Svoboda, Gregory Finger, and Zdenek Bakala (collectively, the "**Purchasers**") for a purchase price of approximately \$5.7 million. The principal asset owned by Swiss Entertainment Company was its indirect interest in the Lausanne Hockey Club, an ice hockey team that competes in the National League in Switzerland.<sup>10</sup>

16. The Lausanne Transaction was scheduled to close prior to the Receivership Order (May 4, 2020) but in fact closed on May 9, 2020, two days after the Receivership Order was granted. The Lausanne Transaction is retroactive to April 30, 2020. As part of the Lausanne Transaction, the net sale proceeds (approximately \$5.7 million) were distributed directly to Bridging.<sup>11</sup> Other than the Receiver's Charge (as defined in the Receivership Order), the Receiver is not aware of any claim against Audible ranking in priority to that of Bridging.<sup>12</sup>

17. As of the date of the Receivership Order, Bridging was owed approximately \$20.5 million, which has been reduced by the distribution arising from the Lausanne Transaction.<sup>13</sup>

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<sup>9</sup> *Ibid* at paras 3.0(3)-(5).

<sup>10</sup> *Ibid* at paras 1.0(5)-(6), 4.0(1)-(2).

<sup>11</sup> *Ibid* at paras 1.0(6), 4.0(1)-(2).

<sup>12</sup> *Ibid* at para 4.1(2).

<sup>13</sup> *Ibid* at para 2.0(2).

18. As the Receiver was not involved in the Lausanne Transaction, it requested that Ken Stickney, a former employee of one of the Companies who led the sale process in respect of the Lausanne Transaction, prepare a memorandum summarizing that sale process (the "**Stickney Memorandum**"). Based on the information contained within the Stickney Memorandum, the Receiver is recommending the *nunc pro tunc* approval of the Lausanne Transaction.<sup>14</sup>

19. The Receiver served the Companies' secured creditors, and the three largest unsecured creditors of Audible (which make up approximately 75% of the total \$1 million owing to unsecured creditors according to the Companies' book and records) with this motion record. The Receiver also served a contingent litigation claimant against Audible.<sup>15</sup>

### **PART III: ISSUES**

20. The issues on this motion are whether:

- (a) the Sale Process should be approved; and
- (b) the Lausanne Transaction and the distribution to Bridging should be approved *nunc pro tunc*.

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

#### **A. The Sale Process**

21. Although approval of a sale process is distinct from the approval of a proposed sale, in a receivership the reasonableness and adequacy of any sale process will be assessed in respect of the *Soundair* factors:

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<sup>14</sup> *Ibid* at paras 4.0(3), 4.0(6), 6.0(1).

<sup>15</sup> *Ibid* at para 4.0(6).

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the efficacy and integrity of the process by which offers are obtained;
- (c) whether there has been unfairness in the working out of the process; and
- (d) the interests of all parties.<sup>16</sup>

22. Therefore, when considering a sales and marketing process proposed by a court-appointed receiver, the relevant considerations the Court should assess are:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.<sup>17</sup>

23. In these circumstances, the Receiver submits that the Sale Process will be fair, open and transparent, and is intended to secure the best possible price for PWH as:

- (a) the length of the Sale Process will provide sufficient time for potential purchasers to assess the proposed sale;

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<sup>16</sup> [CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750](#) at para 6.

<sup>17</sup> [Ibid](#) at para 6; [West End Motors v 189 Dundas Street West Inc, 2019 ONSC 5124](#) at para 14.

- (b) there is flexibility for the Receiver to extend the Sale Process if the circumstances warrant it;
- (c) the timing of the Sale Process will be most beneficial for the asset in light of the upcoming hockey season;
- (d) the proposed Sale Process contemplates a means through which to identify prospective buyers, optimizing the chances for finding a suitable purchaser;
- (e) marketing materials will be produced and an online data room maintained, ensuring that prospective buyers can all have access to the same material information;
- (f) accommodations in respect of COVID-19, namely virtual meetings, are contemplated if necessary;
- (g) the Receiver will oversee the entire Sale Process; and
- (h) the WHL and Bridging support the Sale Process.<sup>18</sup>

24. Based on the above, the Receiver requests that this Court approve the proposed Sale Process.

**B. *Nunc pro tunc* approval of the Lausanne Transaction and the distribution to Bridging**

25. As the Lausanne Transaction closed after the date of the Receivership Order, despite the fact that the Receiver was not involved in the process leading to that transaction, the Receiver is seeking *nunc pro tunc* approval of the Lausanne Transaction and the distribution of the proceeds thereof to Bridging.

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<sup>18</sup> First Report, *supra* note 1 at paras 3.0(1)-(5).



26. In this circumstance, the case law on immediate sales or "quick flips" within a receivership should be applicable to this Court's consideration of the Lausanne Transaction:

Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question.<sup>19</sup>

27. The *Soundair* principles that the Court should consider are:

- (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>20</sup>

28. These principles are to be considered whether or not there was a marketing process or sale conducted by a receiver.<sup>21</sup>

29. Immediate sale transactions or "quick flips" have been approved in a number of circumstances, including where: (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in clear priority of economic interest to all others; and (b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.<sup>22</sup>

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<sup>19</sup> [Elleway Acquisitions Ltd v 4358376 Canada Inc, 2013 ONSC 7009](#) at para 33 [*Elleway*]. See also [9-Ball Interests Inc v Traditional Life Sciences Inc, 2012 ONSC 2788](#) at para 27 [*9-Ball*].

<sup>20</sup> [Royal Bank of Canada v Soundair Corp, \[1991\] 4 OR \(3d\) 1 \(CA\)](#) at para 16; *Elleway*, *supra* note 19 at para 31.

<sup>21</sup> [Textron Financial Canada Ltd v. Beta Ltee \(2007\), 27 CBR \(5<sup>th</sup>\) 1](#) at para 16.

<sup>22</sup> See *Elleway*, *supra* note 19 at para 33.

30. Other considerations include "the impact on various parties" and "whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed."<sup>23</sup> In *Elleway Acquisitions Ltd v 4358376 Canada Inc.*, such a transaction was approved on the basis that the debtor had insufficient cash to engage in a further, extended marketing process, and there was no basis to expect that such a process would result in a better realization on the assets.<sup>24</sup> As described below, these considerations are equally applicable to this case.

31. In addition, when considering an immediate sale transaction, the recommendation of the receiver should be given weight: "Since it is part of the very essence of a receiver's function to make business judgments based on the information then available to it, a court should reject the recommendation of a receiver based on such judgment only in the most exceptional circumstances."<sup>25</sup>

32. Based on the information provided to the Receiver in the Stickney Memorandum, the Receiver is recommending *nunc pro tunc* approval of the Lausanne Transaction. The following information provided in the Stickney Memorandum supports approval based on the *Soundair* principles in consideration of the economic realities of this situation and the specific characteristics of the asset sold through the Lausanne Transaction:

- (a) The market was canvassed for almost a year with a specific strategy to identify potential purchasers.

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<sup>23</sup> *Ibid* at para 34; *Tool-Plas Systems Inc (2008)*, 48 CBR (5<sup>th</sup>) 91 (Ont. SCJ) at para 15; *9-Ball*, *supra* note 19 at para 30.

<sup>24</sup> *Elleway*, *ibid* at paras 35-37.

<sup>25</sup> *9-Ball*, *supra* note 19 at para 28.

- (b) Over 20 potential purchasers were interacted with, and approximately ten of those executed a confidentiality agreement to conduct due diligence.
- (c) The Purchasers have the requisite experience, knowledge and financial resources to have completed the transaction and effect a smooth transition of ownership.
- (d) While the purchase price was lowered significantly numerous times during the negotiations, this was due to unique circumstances including the new risk imposed by the COVID-19 pandemic which resulted in a full suspension of the team and league, but with payroll obligations still to be fulfilled.
- (e) The Companies did not, and do not, have the ability to fund arrears or ongoing obligations, both of which were very significant.
- (f) In the circumstances, the Lausanne Transaction is the only transaction available to the Companies in respect of this asset.
- (g) The Lausanne Transaction has already closed, and it would be difficult to "unscramble the egg".
- (h) Particularly in light of the existing uncertain environment created by the COVID-19 pandemic, there is unlikely to be another opportunity available to the Companies in this respect.
- (i) Bridging, the Companies' senior secured creditor, is supportive of the Lausanne Transaction.

(j) Mr. Stickney, who has extensive experience in selling minor sports franchises, recommends the Lausanne Transaction.<sup>26</sup>

33. Orders approving sale agreements *nunc pro tunc* have been granted in the insolvency context where appropriate.<sup>27</sup> The Receiver believes such an order is appropriate and reasonable in the circumstances of this case.

34. With respect to the distribution of the sale proceeds of the Lausanne Transaction to Bridging, there is no creditor of Audible with priority ahead of Bridging and the Receiver's counsel has provided the Receiver with a security opinion with respect to Bridging's security. Therefore the Receiver believes the distribution was appropriate in the circumstances and should also be approved *nunc pro tunc*.<sup>28</sup>

## **PART V: CONCLUSION**

35. The Receiver requests that this Court grant the order approving the proposed Sale Process and the *nunc pro tunc* approval of the Lausanne Transaction and the associated distribution of the sale proceeds.

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<sup>26</sup> First Report, *supra* note 1 at paras 4.0(7)-(8), Appendix D "Stickney Memorandum".

<sup>27</sup> See [Regal Greets & Gifts Corp \(September 19, 2005\), Toronto, Court File No. 05-CL-6006](#) (Approval and Vesting Order) at para 4; [Brake Pro, Ltd \(November 7, 2007\), Toronto, Court File No. 07-CL-7106](#) (Order) at para 3; [First Leaside Wealth Management Inc \(October 22, 2012\), Toronto, CV-12-9617-00CL](#) (Sale Approval and Vesting Order) at para 2; [Bowring \(Tereve Holdings Ltd.\) \(October 27, 2005\), Toronto, Court File No. 05-CL-6021](#) (Order) at para 11.

<sup>28</sup> First Report, *supra* note 1 at paras 4.1(1)-(3).

## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. [\*Bowring \(Tereve Holdings Ltd.\)\* \(October 27, 2005\), Toronto, Court File No. 05-CL-6021 \(Order\)](#)
2. [\*Brake Pro, Ltd\* \(November 7, 2007\), Toronto, Court File No. 07-CL-7106 \(Order\)](#)
3. [\*CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd\*, 2012 ONSC 1750](#)
4. [\*Elleway Acquisitions Ltd v 4358376 Canada Inc\*, 2013 ONSC 7009](#)
5. [\*First Leaside Wealth Management Inc\* \(October 22, 2012\), Toronto, CV-12-9617-00CL \(Sale Approval and Vesting Order\)](#)
6. [\*Regal Greets & Gifts Corp\* \(September 19, 2005\), Toronto, Court File No. 05-CL-6006 \(Approval and Vesting Order\)](#)
7. [\*Royal Bank of Canada v Soundair Corp\*, \[1991\] 4 OR \(3d\) 1 \(CA\)](#)
8. [\*Textron Financial Canada Ltd v. Beta Ltee\* \(2007\), 27 CBR \(5<sup>th</sup>\) 1](#)
9. [\*Tool-Plas Systems Inc\* \(2008\), 48 CBR \(5<sup>th</sup>\) 91 \(Ont. SCJ\)](#)
10. [\*West End Motors v 189 Dundas Street West Inc\*, 2019 ONSC 5124](#)
11. [\*9-Ball Interests Inc v Traditional Life Sciences Inc\*, 2012 ONSC 2788](#)

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Proceedings commenced in Toronto

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