

Court File No. _____

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

B E T W E E N:

MIDCAP FUNDING IV TRUST

Applicant

- and -

AVAD CANADA LTD.

Respondent

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

**FACTUM OF THE APPLICANT
(Application Returnable March 17, 2021)**

March 16, 2021

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FACTUM OF THE APPLICANT

PART I - INTRODUCTION

1. MidCap Funding IV Trust ("**MidCap**") is agent for the lenders under a secured credit facility (the "**Secured Credit Facility**") provided to AVAD Canada Ltd. (the "**Debtor**").
2. MidCap, as agent, holds a general security interest over all of the personal property of the Debtor, subject to limited exclusions.
3. The Debtor has committed certain defaults under the Secured Credit Facility. The obligations thereunder are due and payable and have not been repaid in full.

4. The Debtor is also in the process of winding down its operations and the board and officers of the Debtor either have, or shortly will have, resigned.
5. MidCap seeks the appointment of MNP Ltd. (the “**Receiver**”) as receiver to administer the wind down and liquidation of the Debtor.
6. The appointment of the Receiver is just and convenient in the circumstances.
7. MidCap is not aware of any other secured creditors of the Debtor.
8. The Debtor does not oppose the appointment of the Receiver.

PART II - THE FACTS

The Debtor

9. The Debtor was the Canadian operating affiliate of the North American business of AVAD, a wholesale distributor of a variety of electronic equipment and accessories.¹
10. On or about March 16, 2021, substantially all of the business and assets of the United States affiliates of the Debtor are expected to be sold (the “**US Sale Transaction**”). The business and assets of the Debtor are not included in that transaction.²
11. The Debtor’s business was highly dependent upon its US affiliates for management, operational, administrative and financial support. As a result of the US Sale Transaction, that support will no longer be available. The management of the Debtor has determined that upon

¹ Affidavit of Patrick Reid, sworn March, 2021 (**Reid Affidavit**) at para. 4, Application Record returnable March 17, 2021 (**AR**), Tab 2.

² Reid Affidavit at para. 5, AR, Tab 2.

completion of the US Sale Transaction, the Debtor's business is no longer commercially viable and is being wound down.³

12. Following completion of the US Sale Transaction any remaining officers of the Debtor are expected to resign.⁴

13. The Debtor was continued under the laws of British Columbia. Its primary Canadian office is located in Mississauga, Ontario and its tangible assets consist of inventory located at warehouses in Mississauga, Ontario and Calgary, Alberta. Approximately half of the Debtor's inventory, at book value, is located at each of these warehouses. The only material assets owned by the Debtor other than the above described inventory are: (i) accounts receivable; and (ii) cash located in bank accounts, which accounts are subject to blocked account arrangements in favour of MidCap.⁵

14. MidCap believes the Debtor's available liquidity is insufficient to satisfy the Debtor's liabilities to creditors.⁶

15. The remaining material activities for the Debtor are: (i) realizing upon inventory and accounts receivable; (ii) distributions of realizations to creditors in accordance with their respective priorities; and (iii) a termination of all remaining operations of the Debtor.⁷ MidCap believes that these activities should be undertaken as quickly and efficiently as possible to preserve value for all stakeholders.

³ Reid Affidavit at para. 6, AR, Tab 2.

⁴ Reid Affidavit at para. 7, AR, Tab 2.

⁵ Reid Affidavit at paras. 8-11, AR, Tab 2.

⁶ Reid Affidavit at para. 34, AR, Tab 2.

⁷ Reid Affidavit at para. 33, AR, Tab 2.

MidCap Financing

16. The Debtor is indebted to the lenders represented by MidCap, as agent, pursuant to a Credit and Security Agreement dated October 2, 2018 (as amended from time to time, the “**Credit Agreement**”).⁸

17. Under the Credit Agreement, the Debtor is the “Canadian Borrower” and was provided a revolving facility with availability up to \$4,000,000. As of March 15, 2021, approximately US\$498,024.91 remains owing by the Debtor under the Credit Agreement.⁹

18. MidCap, as agent, holds a perfected security interest over all of the Debtor's assets, pursuant to, among other things, the Credit Agreement and a General Security Agreement dated October 2, 2018 (the “**Canadian GSA**”).¹⁰ As noted above, certain of the Debtor's bank accounts are also subject to blocked account agreements with MidCap and the applicable financial institutions at which those accounts are held.¹¹

19. There are no known secured creditors of the Debtor other than MidCap and the lenders it represents.¹²

Defaults

20. Certain events of default have been committed under the Credit Agreement (the “**Defaults**”). These Defaults include, among other things, failures to deliver audited financial statements, failures to deliver an excess cash flow certificate, failures to deliver monthly

⁸ Reid Affidavit at para. 14, AR, Tab 2.

⁹ Reid Affidavit at paras 15 and 16, AR, Tab 2.

¹⁰ Reid Affidavit at para. 3(a), AR, Tab 2.

¹¹ Reid Affidavit at para. 21, AR, Tab 2.

¹² Reid Affidavit at para. 28, AR, Tab 2.

financial statements and compliance certificates, and failure to comply with certain financial ratio covenants.¹³

21. As a result of the Defaults, the obligations of the Debtor under the Credit Agreement are due and payable and the security granted by the Debtor to MidCap has become immediately enforceable.¹⁴

22. MidCap has delivered a demand letter to the Debtor as well as a notice of intention to enforce security under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, as amended (the “BIA”).¹⁵

23. The obligations under the Credit Agreement have not been repaid in full at this time.¹⁶

24. The Debtor has waived the ten day enforcement notice period under the BIA.¹⁷

Other Creditors

25. A balance sheet dated March 8, 2021 that has been provided to me by the Debtor identifies the following liabilities of the Debtor, in addition to the obligations under the Credit Agreement: trade payables; taxes payable to a vendor; payroll liabilities; intercompany payables owing to affiliates; and miscellaneous payables and accruals. Additional liabilities may crystallize as a result of the wind down of the Debtor’s business.¹⁸

¹³ Reid Affidavit at para. 22, AR, Tab 2.

¹⁴ Reid Affidavit at para. 24, AR, Tab 2.

¹⁵ *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the “BIA”)

¹⁶ Reid Affidavit at para. 27, AR, Tab 2.

¹⁷ Reid Affidavit at para. 26, AR, Tab 2.

¹⁸ Reid Affidavit at para. 29, AR, Tab 2.

Need For A Receiver

26. In the circumstances, it appears that the best option to preserve the value of the Debtor's assets for the benefit of all creditors is an expedited and orderly realization.¹⁹

27. MidCap believes that it requires the assistance of a court-appointed receiver to undertake that realization process. An out-of-court enforcement and realization process is not feasible in the current circumstances for a number of reasons:

- (a) It would be infeasible for a private party, without the protections of a court order, to efficiently deal with the assets of the Debtor in the current circumstances, particularly if no directors or officers having authority to deal with such assets will remain with the Debtor;
- (b) A stay of proceedings is necessary to ensure no party takes steps that may prejudice the rights of MidCap and other creditors to realize value from the Debtor's assets;
- (c) There may be a shortfall to unsecured creditors. A court-appointed officer would be beneficial to ensure legal priorities are respected and all creditors are treated in accordance with their legal entitlements; and
- (d) The appointment of a receiver will allow terminated employees the opportunity to access Canada's Wage Earner Protection Program to the extent such terminated employees are eligible for that program.²⁰

PART III - ISSUES AND THE LAW

28. The sole issue for determination on this motion is whether the appointment of a receiver over the assets of the Debtor is appropriate.

¹⁹ Reid Affidavit at para. 35, AR, Tab 2.

²⁰ Reid Affidavit at para. 36, AR, Tab 2.

Appointment of a Receiver pursuant to the BIA and/or the Courts Of Justice Act, R.S.O. 1990, C. C-43, as amended (the "CJA")²¹

29. Section 243 of the BIA provides for the appointment of a receiver when it is "just and convenient" to do so:

(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 and 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.

(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.²²

30. Section 101 of the CJA similarly provides for the appointment of a receiver when it is "just or convenient" to do so:

In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.²³

²¹ *Courts Of Justice Act*, R.S.O. 1990, C. C-43, as amended (the "**CJA**").

²² BIA, s. 243(1).

²³ CJA, s. 101.

31. It is clear that MidCap is a secured creditor entitled to make an application under Section 243 of the BIA.

32. The powers that MidCap requests this Honourable Court provide to the Receiver are within the scope of those listed in Section 243 of the BIA and are consistent with the powers generally granted by the Court.

33. MidCap has sent the notice required under section 244 of the BIA and the Debtor has consented to an earlier enforcement under subsection 244(2) of the BIA.²⁴

34. The Debtor is an “insolvent person” under the BIA²⁵ because it is unable to meet its obligations as they generally become due.

35. The only remaining question is whether the appointment of a receiver is just and/or convenient in the circumstances. When considering whether the appointment is just and convenient, the Ontario court has explained that:

The question is whether it is more in the interests of all concerned to have the receiver appointed or not. In order to answer the question the court must consider all the circumstances of the case, particularly:

- a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;
- b) The parties’ conduct; and
- c) The nature of the property and the rights and interests of the parties in relation to it.²⁶

36. Any express provision for the appointment of a receiver in the relevant security documents is also considered to be a relevant factor by courts in Ontario.²⁷

²⁴ Reid Affidavit at para. 26, AR, Tab 2.

²⁵ BIA, s. 2 definition of insolvent person.

37. MidCap submits that in the circumstances of this case the appointment of the Receiver would be just and convenient for the following reasons:

- (a) Following completion of the US Sale Transaction, no board or management is expected to remain to supervise the Debtor or its property.²⁸ This creates risk both of dissipation of assets and delays in realizing upon those assets. A receiver would be able to take steps to mitigate those risks and maximize returns through an expedited realization of the Debtor's assets.
- (b) MidCap has the right under its security documents to seek the appointment of a receiver.²⁹
- (c) A stay of proceedings will assist in ensuring that legal priorities of the claims of various creditors are preserved and respected.
- (d) It is expected that this receivership will be for a short term in order to facilitate an expedited realization on the assets of the Debtor.
- (e) There are no viable alternatives to the appointment of a receiver for the purposes of monetizing the Debtor's assets.
- (f) The appointment of a receiver will allow access to the federal Wage Earner Protection Program to the extent required by any eligible employees of the Debtor.

²⁶ *Business Development Bank of Canada v. Pine Tree Resorts Inc. and 1212360 Ontario Limited* [2013 ONSC 1911 \(CanLII\)](#) at para. 22.

²⁷ *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, [2014 ONSC 5205 \(CanLII\)](#) at paras. 28 and 29.

²⁸ Reid Affidavit at para. 7, AR, Tab 2.

²⁹ Reid Affidavit at para. 37, AR, Tab 2; Canadian General Security Agreement dated October 2, 2018, Exhibit "B" to the Reid Affidavit, section 4.2, AR, Tab 2.

38. The Debtor does not oppose the appointment of the Receiver.

Distribution of Proceeds

39. The requested order would empower the Receiver to distribute to MidCap, as agent, amounts from the proceeds of the realization of the Debtor's assets to pay down the Credit Agreement obligations from time to time to the extent those proceeds are not required to satisfy the costs of the receivership, operating costs of the Debtor, or any amounts required to satisfy priority claims. This provision is intended to expedite and streamline distributions to MidCap, thereby reducing the costs of the receivership process and reducing interest accruals. It is submitted that no other party is prejudiced by this order as MidCap, as agent, is the only known secured creditor of the Debtor and the payments provided for under the proposed order will be subject to the prior receipt of an opinion of the Receiver's counsel on the MidCap security. The proposed order is also consistent with the blocked account arrangements entered into between MidCap and the Debtor. Orders of this type have been granted in other receivership proceedings in similar circumstances.³⁰

Insurance Matters

40. The Commercial List model form of order appointing a receiver provides for the continuation of services and supplies, including insurance, following the appointment of the receiver. The proposed form of order requested in this case includes an additional provision that is intended to clarify that any applicable insurers shall not terminate or fail to renew insurance policies provided that such insurers are paid applicable premiums. This provision is intended only to provide additional clarification and confirmation regarding the customary model

³⁰ *In the Matter of Celadon Group, Inc.*, CV-20-00634911-00CL, [Supplemental Order \(Foreign Main Proceeding\) dated January 23, 2020](#) at para. 33; *Callidus Capital Corporation v. JD Norman Canada, ULC*, CV-21-00656820-00CL, [Order \(Appointing Receiver\) dated February 12, 2021](#) at para 25.

order provision directing the continuation of services generally. A similar order has been granted previously by the Ontario court.³¹

PART IV - ORDER REQUESTED

41. For the reasons set out above, MidCap respectfully requests an order appointing MNP Ltd. as receiver of the assets, property and undertaking of the Debtor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of March, 2021.

March 16, 2021



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³¹ *Buduchnist Credit Union Limited v. Dundas Retirement Place Inc., et al.*, CV-20-74570, [Order \(Appointing Receiver\) dated December 23, 2020](#) at para. 15.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Business Development Bank of Canada v. Pine Tree Resorts Inc. and 1212360 Ontario Limited* [2013 ONSC 1911 \(CanLII\)](#)
2. *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, [2014 ONSC 5205 \(CanLII\)](#)
3. *In the Matter of Celadon Group, Inc.*, CV-20-00634911-00CL, [Supplemental Order \(Foreign Main Proceeding\) dated January 23, 2020](#)
4. *Callidus Capital Corporation v. JD Norman Canada, ULC*, CV-21-00656820-00CL, [Order \(Appointing Receiver\) dated February 12, 2021](#)
5. *Buduchnist Credit Union Limited v. Dundas Retirement Place Inc., et al.*, CV-20-74570, [Order \(Appointing Receiver\) dated December 23, 2020](#)

SCHEDULE “B”
RELEVANT STATUTES

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

2 insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person’s business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person’s current assets — regardless of when that other claim, right, charge or security arose — except rights under [sections 81.1](#) and [81.2](#).

Liability of receiver

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

Claims of officers and directors

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

Definitions

(9) The following definitions apply in this section.

compensation includes vacation pay but does not include termination or severance pay. (*rémunération*)

person who is subject to a receivership means a person any of whose property is in the possession or under the control of a receiver. (*personne faisant l'objet d'une mise sous séquestre*)

receiver means a receiver within the meaning of [subsection 243\(2\)](#) or an interim receiver appointed under [subsection 46\(1\)](#), [47\(1\)](#) or [47.1\(1\)](#). (*séquestre*)

Court may appoint receiver

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

(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.

Courts of Justice Act, R.S.O. 1990, C. C-43, as amended

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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