

**THE QUEEN'S BENCH
Winnipeg Centre**

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

**NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC.,
NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD
PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and
NYGARD INTERNATIONAL PARTNERSHIP,**

Respondents.

AFFIDAVIT OF JOE ALBERT

AFFIRMED this 12th day of November, 2020

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Lawyers for Albert Gelman Inc.

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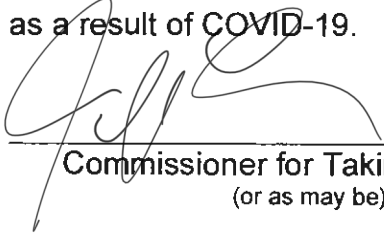
I, JOE ALBERT, of the City of Oakville, in the Province of Ontario, AFFIRM:

1. I am a principal of Albert Gelman Inc. ("AGI"), a Licensed Insolvency Trustee (a "LIT") and the proposed LIT in a Notice of Intention to Make a Proposal for certain of the Respondents.
2. Attached to my affidavit as Exhibit "A" is AGI's Supplementary First Pre-Filing Report (the "Report") prepared in connection with AGI's proposed role as LIT.

3. I believe the contents of the Report to be true, subject to the qualifications set out therein. To the extent I have relied on information and advice of others, I have identified the source of the information in the Report and believe that the information and advice to be true.

AFFIRMED remotely on this 12th day of November, 2020 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely

This affidavit was commissioned remotely as a result of COVID-19.

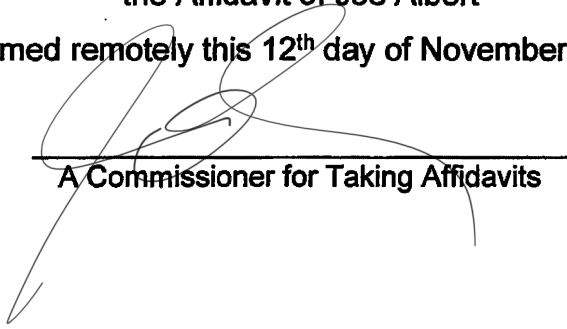


Commissioner for Taking Affidavits
(or as may be)



JOE ALBERT

**This is Exhibit "A" referred to in
the Affidavit of Joe Albert
affirmed remotely this 12th day of November, 2020**



A Commissioner for Taking Affidavits

**THE QUEEN'S BENCH
Winnipeg Centre**

IN THE MATTER OF THE RECEIVERSHIP OF NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., AND NYGARD INTERNATIONAL PARTNERSHIP

SUPPLEMENTARY FIRST PRE-FILING REPORT OF ALBERT GELMAN INC.

In its Capacity as Proposed Proposal Trustee of some or all of Nygard International Partnership, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd. and 4093887 Canada Ltd.

(dated November 12, 2020)

I. INTRODUCTION

1. On November 5, 2020 Albert Gelman Inc. (“**AGI**”) filed its First Pre-Filing Report in its capacity as consultant and proposed LIT in a Notice of Intention to make a Proposal (“**NOI**”) that, if permitted by the Court, will be filed by NIP, 879Co and 887Co (defined below). This supplementary report (the “**Supplementary First Pre-Filing Report**”) has been prepared in response to certain comments made by the Receiver in its Supplementary Ninth Report (defined below).

II. TERMS OF REFERENCE

2. While AGI has reviewed various documents provided by the parties named herein, such review does not constitute an audit or verification of such information for accuracy, completeness or compliance with Generally Accepted Accounting Principles (“**GAAP**”) or International Financial Reporting Standards (“**IFRS**”) or otherwise. Accordingly, AGI expresses no opinion or other form of assurance pursuant to GAAP or IFRS or otherwise with respect to such information except as expressly stated herein.
3. This Supplementary First Pre-Filing Report has been prepared solely for the purposes set out above. Accordingly, the reader is cautioned that this Supplementary First Pre-Filing Report may not be appropriate for any other purpose. AGI will not assume responsibility or liability for losses incurred by the reader as a result of the circulation, publication, reproduction or use of this Supplementary First Pre-Filing Report contrary to the provisions of this paragraph.
4. All capitalized terms not otherwise defined in this Supplementary First Pre-Filing Report shall have the meaning ascribed to them in the Receiver’s Seventh Report dated September 10, 2020 (“**Seventh Report**”), the Receiver’s Eighth Report dated September 28, 2020 (“**Eighth Report**”), the Receiver’s Supplementary Eighth Report dated October 12, 2020 (the “**Supplementary Eighth Report**”), the Receiver’s Ninth Report dated November 2, 2020 (the “**Ninth Report**”) and the Receiver’s Supplementary Ninth Report dated November 10, 2020 (the “**Supplementary Ninth Report**”).
5. Unless otherwise noted, all monetary amounts referenced herein are in Canadian dollars.

III. RECEIVER’S SUPPLEMENTARY NINTH REPORT

6. AGI has thoroughly reviewed the Receiver’s Supplementary Ninth Report. Nothing stated within that report would lead AGI to alter or add to any of the analysis, opinions and conclusions set out in its First Pre-Filing Report, other than the items set out below.
 - a. In AGI’s First Pre-Filing Report at paragraph 29, it states, “On the basis that NPL’s loan due from NIP is secured, the offset of claims will always result in NIP retaining \$1.1 million in cash”. AGI now adds to this paragraph, “In the event it is ultimately determined that any secured claim of

NPL as against NIP is less than \$19.6 million, then any decrease in NPL's claim will, dollar for dollar, increase the net resulting \$1.1 million owing to NIP from NEL. This conclusion holds whether NIP is the White Oaks Borrower or NIP is treated as having received the loan proceeds from the US Debtors."

- b. In AGI's First Pre-Filing Report at paragraph 130(a) its states, "[the general terms of the proposal contemplated will include] a payment of \$1.1 million from NEL to NIP, as part of a settlement between NIP, NEL and NPL whereby NIP's debt to NPL will be extinguished and NEL's debt to NIP will be extinguished". AGI further comments that in any Proposal ultimately filed by NIP, NEL will be liable to pay the net amount determined to be owing by it to NIP.

7. AGI's comments in this Supplementary First Pre-Filing Report are for consideration of the Manitoba Court in respect of the Receiver First Motion, the Respondent Motion and the Receiver Second Motion.

Accounting Treatment

8. Contrary to the Receiver's repeated assertions set out in its Supplementary Ninth Report, AGI's findings set out in its First Pre-Filing Report at paragraph 8 do not entirely rely upon the accounting treatment applied by the Nygard accounting staff with respect to:
 - a. advances made by the Lenders under the Credit Facility; and,
 - b. the proceeds generated from the sale of the Toronto Property and the Notre Dame Property (defined by the Receiver in its Supplementary Report as, the "**NPL Property Sales**").
9. The accounting treatment, in and of itself, was considered by AGI as lending support of AGI's conclusions. However, AGI placed more weight on the facts themselves that underly the transactions involved.

Advances under the Credit Facility

10. Nygard accounting staff accounted for the receipt of the advances under the Credit Facility as a loan due from NIP to White Oak. AGI stated at paragraph 22 of its First Pre-Filing Report that, "The proper accounting treatment, in accordance with the terms of the Credit Agreement would be that one or more of the US Debtors, as borrowers, would account for the Loan in its records and that NIP would account for the receipt of the Loan [proceeds] as an intercompany payable due to the US Debtor(s)/borrower." At paragraph 35 of the Supplementary Ninth Report the Receiver confirms that it agrees with AGI's assessment of the proper accounting treatment set out above.
11. According to the Direction Letter (defined in paragraph 31 and attached as Exhibit "A" to the Receiver's Supplementary Ninth Report) the initial advance by the Lenders of approximately \$27.8 million was distributed as follows: (a) approximately \$23.5 million to BMO to pay in full a loan owing to BMO for which

NIP was the borrower (the “**BMO Loan**”); (b) \$1.8 directly to NIP; and, (c) the balance to pay professional fees and other costs required to close the financing transaction.

12. NIP was the borrower in respect of the BMO Loan. This is stated in the combined financial statements audited by Ernst & Young (“**EY**”), for the fiscal year ended January 31, 2018, wherein EY states that “these combined financial statements have been prepared by management to comply with the financial reporting provision of the lending agreement dated May 5, 2018 between [NIP] and Bank of Montreal”.
13. In light of the above, it is understandable why the Nygard accounting staff booked the loan from White Oak as a liability only in NIP’s accounting records (and not in the accounting records of any of the other Borrowers or guarantors).
14. Attached as **Exhibit “B”** is the February 1, 2020 consolidated balance sheet of NIP, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Holdings (USA) Limited, 879Co and 887Co provided to AGI by the Receiver. AGI points out that NPL was not included in the group making up the combined financial statements. The consolidated balance sheet indicates that NIP is the only one in the group that accounts for the White Oaks bank loan, indicated on the attached as a bank loan of \$33,145,893.
15. Although it appears that NIP was the sole beneficiary of the Loan proceeds and may, in fact, be the “borrower”, AGI’s analysis set out below is based on the scenario that the Borrower(s) are the US Debtors.

Proceeds from Sale of NPL Property Sales

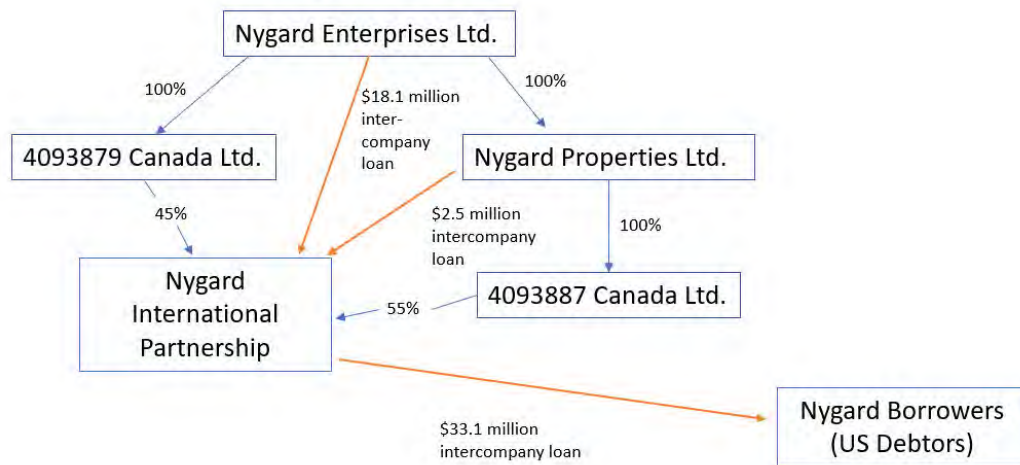
16. When the NPL Property Sales were completed, net proceeds of \$19.6 million were generated. The Nygard accounting staff assumed that the funds were to flow (for accounting purposes) from NPL to NIP and then to the Lenders to repay the White Oak Loan (which liability was recorded in the accounting records of NIP as indicated above). This created a debt owing from NIP to NPL and the net effect was that in the books of both NPL and NIP, NIP owed NPL \$17.1 (19.6 less 2.5) million. We confirm that, even if the original accounting treatment by the Nygard accounting staff is incorrect, AGI’s conclusion in its First Pre-Filing Report remains the same. AGI confirms that the accounting treatment is consistent with the proposition of law (set out at paragraph 27 of AGI’s First Pre-Filing Report) that NPL, as a guarantor who satisfies the primary obligation under the loan, is entitled to a claim against NIP. As a result, even if the original accounting treatment by the Nygard accounting staff is incorrect, ultimately the same accounting treatment will prevail due to NPL’s claim as against NIP. We set out below why only NPL has a claim to the security of the Lenders and why NIP is not entitled to the same claim.

Rights of Claim as Against NIP

17. The Receiver states at paragraph 62 of its Supplementary Ninth Report, “the extent that NIP and NPL, as guarantors, have paid obligations of the Borrowers to the Lenders and become respectively subrogated to

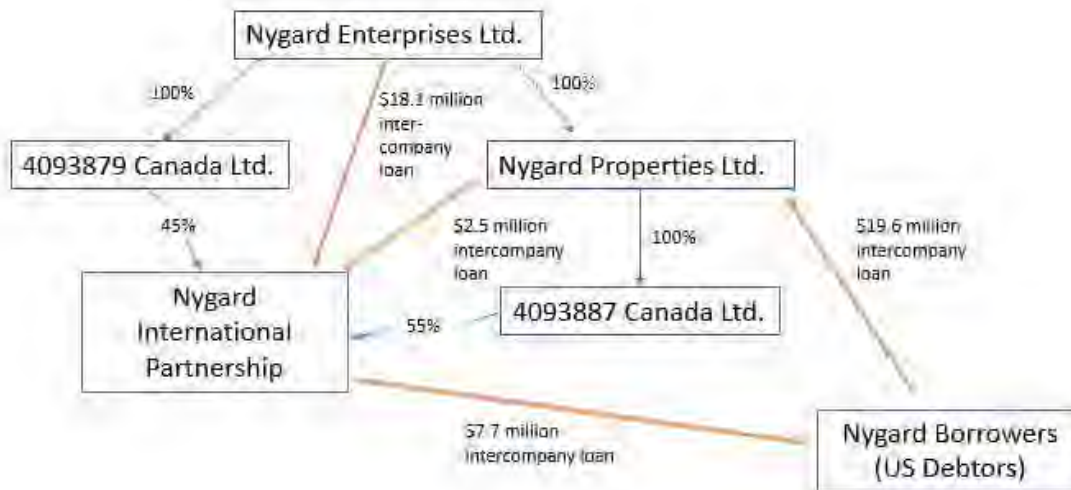
debt / security held by the Lenders, both NIP and NPL would essentially be “sharing” the subrogated rights to the security of the Lenders over the Inkster Property and the Broadway Property.” This paragraph is incorrect because NIP repaid a portion of its intercompany loan owing to the borrowers. NIP did not make a payment to the Lenders under the NIP guarantee and, therefore, NIP does not have a claim to the security of the Lenders.

18. NIP has not paid obligations of the Borrowers and is therefore not entitled to share in any claim. Rather, as discussed in detail below, NPL was the only guarantor who paid the obligation to the Lenders and, therefore, only NPL has a claim to the security of the Lenders (including the security over the Inkster Property and the Broadway Property).
19. Set out below is an illustration of the Canadian Debtors and US Debtors (also referred to as the “Borrowers”) including the intercompany loans as at January 31, 2020, after funds were advanced from the Lenders to the Borrowers and then directed to NIP.
20. Shown below is the loan due from NIP to the Borrowers, resulting from the advances paid under the Credit Facility directly to NIP. Both AGI (at paragraph 22 of its First Pre-Filing Report) and the Receiver (at paragraph 35 of its Supplementary Ninth Report) agree that this is the correct accounting treatment (assuming that NIP is a guarantor and not the borrower).



21. As shown above, as at January 31, 2020, being the fiscal year end prior to the appointment of the Receiver and after the loan advance by White Oaks, NIP owed the Borrowers \$33.1 million in respect of the proceeds from the Credit Facility. It follows that any amounts realized by the Receiver from the sale of NIPs assets to repay the Lenders would directly reduce the intercompany loan of \$33.1 million owed by NIP to the Borrowers.

22. Attached as **Exhibit “A”** is a schedule prepared by AGI in which AGI has provided an estimate of the allocation of the proceeds and costs between NIP, Nygard Inc and NPL based upon the assumptions and methods set out in the notes to the schedule. This schedule shows that the net realization from NIP were approximately \$25.4 million. NIP remains indebted to the Borrowers in the amount of \$7.7 million (\$33.1 million less \$25.4 million). The end result is: (a) the Lenders are paid in full; (b) NIP has repaid \$25.4 million of its intercompany loan due to the Borrowers; (c) the Borrowers have repaid a portion of the Loan, and, (d) NPL, as guarantor, paid the balance due to the Lender. Set out below for illustrative purposes is an organization chart showing the Canadian Debtors and US Debtors (also referred to as the “Borrowers”) including the intercompany loans after the Loan has been (substantially) repaid in full to the Lenders (and assuming that the Receiver’s method for accounting for the sale of the NPL Property Sales is correct).



23. As is illustrated above, in no scenario did NIP make payments to the Lenders to repay the Loan and, therefore, does not have a claim (or “right of subrogation”, a phrase used by the Receiver) to be “shared” with NPL. NPL is the only guarantor which has a claim as against NIP.

24. AGI notes that in the Receiver’s Ninth Report it indicates that the allocation of proceeds and costs is a “complicated” task and has not, as of yet, set out for the Court its recommendation on any proposed allocation. AGI has prepared the most reasonable allocation it can based upon the information it has available at this time.

IV. CONCLUSIONS

25. Nothing stated within the Receiver’s Supplementary Ninth Report would lead AGI to alter or add to any of the analysis, opinions and conclusions set out in AGI’s First Pre-Filing Report other than for the additions outlined in paragraph 6 of this report.

All of which is respectfully submitted this 12th day of November 2020

**ALBERT GELMAN INC., solely in its capacity as Proposed
Proposal Trustee of some or all of Nygard International Partnership, Nygard Enterprises Ltd.,
Nygard Properties Ltd., 4093879 Canada Ltd. and 4093887 Canada Ltd.
and not in its personal or any other capacity**



Per:

Joe Albert, CPA, DIFA, LIT

"A"

	Receivers Interim R&D to Oct 24/20	Allocation			Notes
		NPL	NIP	Nygard Inc.	
Cash on Hand - Mar 18/20	\$ 73	-	73	-	(1)
Receipts					
Accounts receivable and other collections	17,715	-	15,944	1,772	(2)
Real Estate	19,400	19,400	-	-	(3)
Sales receipts	43,757	-	43,757	-	(4)
Total Receipts	80,872	19,400	59,701	1,772	(5)
			97%	3%	(5)
Disbursements					
Payroll	12,831	-	12,446	385	
Rent	6,161	-	5,976	185	
Utilities, operating expenses and other	2,471	-	2,397	74	
Insurance	834	-	809	25	
Postage, courier and logistics providers	1,310	-	1,271	39	
Asset protection services	327	-	317	10	
Chargebacks, returns and bank fees	466	-	452	14	
Consultant Fees	2,878	-	2,792	86	
Professional Fees	4,778	478	4,171	129	(6)
Receivers' Sales Taxes	302	-	293	9	
Debtors' Sales Taxes	3,476	-	3,372	104	
Total Disbursements	35,834	478	34,296	1,061	
Excess of Receipts over Disbursements	\$ 45,038	18,922	25,405	711	
Less: Distribution to Lenders	(35,995)	(18,922)		(711)	
Less: Repayment to US Borrowers			(16,362)		(7)
Cash on Hand - Oct 24/20	\$ 9,116	-	9,116	-	

Notes:

- (1) AGI has assumed that cash on hand belongs to NIP.
- (2) As at February 1, 2020 NIP and Nygard Inc. had \$17.9 million \$1.9 million, respectively, of accounts receivable. AGI has allocated the "Accounts receivable and other collections" proportionately at 90% and 10% amongst NIP and Nygard Inc.
- (3) Represents net proceeds from sale of Toronto Property and Notre Dame Property as per Receiver's counsel.
- (4) As at February 1, 2020 NIP had \$58.7 million of inventory on hand. Nygard Inc. had no Inventory. Accordingly, AGI has allocated "sales receipts" entirely to NIP.
- (5) Allocation of expenses, other than those attributable to NPL as per Note 6, have been based upon the proportionate realization of the assets of NIP and Nygard Inc; being 97% and 3%, respectively.
- (6) AGI has arbitrarily allocated 10% to NPL, with the remainder allocated amongst NIP and Nygard Inc at 97% and 3%, respectively.
- (7) Based upon the assumptions set out above, AGI roughly estimates that \$18,922,000 from NPL's assets and \$711,000 from Nygard Inc.'s were paid directly to the Lender/Receiver. Of the approximately \$25,405,000 realized from NIP's assets, approximately \$16,362,000 was used to repay the intercompany loan owing the US Borrowers (who then in turn repaid the Lender) and the balance of approximately \$9,116,000 is in the Receiver's trust bank account.

"B"

**NYGARD COMBINED
CONSOLIDATED BALANCE SHEET WORKING COPY
FEB 1, 2020**

	NIP	INC	FV	NY LLC	NHU	CAN879	CAN887	Total
CASH	3,456,637	5,954	0	0	0	0	0	3,462,591
ACCOUNTS RECEIVABLE	17,935,755	1,947,636	0	123,242	0	0	0	20,006,633
INTERCOMPANY	24,701,654	(9,919,870)	11,153,548	(8,217,232)	7,468,979	(908,911)	(354,493)	23,923,676
INCOME TAXES (INCL WITHHOLDING TAX) DUE FROM RELATED COMPANIES	0	0	0	0	0	0	0	-
INVENTORY	58,729,084	(283,665)	0	106,038	0	0	0	58,551,457
PREPAIDS	1,405,581	162,216	0	0	0	0	0	1,567,797
TOTAL CURRENT ASSETS	106,228,711	(8,087,728)	11,153,548	(7,987,951)	7,468,979	(908,911)	(354,493)	107,512,155
CAPITAL ASSETS	19,119,129	14,852	0	(2,478)	0	0	0	19,131,503
OTHER ASSETS - TM	8,284,137	46,751,001	0	0	0	0	0	55,035,138
OTHER ASSETS - LONG TERM	3,733,872							3,733,872
INVESTMENT IN ZELLERS CR BRAND	0	0	0	0	0	0	0	0
INVESTMENT IN NYGARD PROPERTIES (USA)	11,596,793	0	0	0	0	0	0	11,596,793
INVESTMENT IN NYGARD INC	0	0	0	0	897,746	0	0	897,746
INVESTMENT IN NYGARD HOLDINGS (USA)	8,119,501	0	0	0	0	0	0	8,119,501
INVESTMENT IN FV INC		15,482,610	0	0				15,482,610
NOTE RECEIVABLE FROM NV			10,586,511					10,586,511
INVESTMENT IN NIP	-	-	-	-	-	41,683,737	57,818,405	99,502,142
FUTURE TAXES								0
TOTAL ASSETS	157,082,143	54,160,735	21,740,059	(7,990,429)	8,366,725	40,774,826	57,463,912	331,597,970
LIABILITIES & EQUITY:								
INCOME TAXES	1,773,158	(3,542,787)	-	-	825,627	2,302,858	2,843,913	4,202,769
BANK LOANS	33,145,893	-	-	-	-	-	-	33,145,893
ACCOUNTS PAYABLE & ACCRUALS	22,432,808	1,238,247	132	619	(6)	0	0	23,671,801
INTERCOMPANY	-	-	-	-	-	-	-	-
	57,351,859	(2,304,540)	132	619	825,621	2,302,858	2,843,913	61,020,463
LONG TERM DEBT	2,518,831.55							2,518,831.55
FUTURE TAXES								-
TOTAL LIABILITIES	59,870,691	(2,304,540)	132	619	825,621	2,302,858	2,843,913	63,539,295
COMMON STOCK	-	8,223	13,750,870	-	-	37,584,712	42,762,096	94,105,901
COMMON STOCK - NEW		1,030						1,030
PREFERRED SHARES					7,429,559			7,429,559
CAPITAL	102,100,463	0	0	0	0	0	0	102,100,463
DRAWINGS	(632,450)	0	0	0	0	0	0	(632,450)
CUMULATIVE TRANSLATION ADJUSTMENT	-	7,791,262	2,380,530	(1,055,703)	22,924	-	-	9,139,014
CONTRIBUTED SURPLUS	-	2,744,088	-	-	-	(16,090)	3,691,826	6,419,824
CONTRIBUTED SURPLUS - NEW		697,397.89			698,428			1,395,825
DIVIDENDS	-	-	-	-	(911,977)	-	-	(911,977)
RETAINED EARNINGS (DEFICIT)-TY	(1,701,123)	45,223,274	5,608,526	(6,935,345)	302,170	903,346	8,166,077	51,566,924
RETAINED EARNINGS (DEFICIT) - OPEN RPE	(2,555,437)	0	0	0	0	0	0	(2,555,437)
TOTAL CAPITAL	97,211,452	56,465,274	21,739,927	(7,991,048)	7,541,104	38,471,968	54,619,999	268,058,676
TOTAL LIABILITIES & CAPITAL	157,082,143	54,160,735	21,740,059	(7,990,429)	8,366,725	40,774,826	57,463,912	331,597,971