

IN THE COURT OF APPEAL
IN BANKRUPTCY AND INSOLVENCY

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:

FILED
COURT OF APPEAL

MAR 25 2022

LAW COURTS
WINNIPEG

WHITE OAK COMMERCIAL FINANCE, LLC,

(Applicant) Respondent,

– 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) Applicants.

NOTICE OF MOTION
BEFORE A JUDGE IN CHAMBERS
Hearing Date: Thursday, April 7, 2022, at 10:00 a.m.

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NOTICE OF MOTION

TAKE NOTICE that a motion will be made on behalf of the (Respondents)
Applicants, 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 (collectively, the "Applicants") before a Judge of the Court of Appeal sitting in chambers on Thursday, April 7, 2022, at 10:00 a.m., or as soon after that time as the motion can be heard at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR:

1. An Order extending the time for filing the Notice of Appeal; and
2. Such further and other relief as the nature of this case requires and this Honourable Court deems just and appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. Rule 42 of the *Court of Appeal Rules*, Man Reg 555/88;
2. Rule 31(1) of the *Bankruptcy and Insolvency General Rules*;
3. Section 187(11) of the *Bankruptcy and Insolvency Act*;
4. The Applicants filed their Notice of Appeal one day after the expiration of the prescribed 10-day time limit set out in Rule 31(1) of the *Bankruptcy and Insolvency General Rules*;
5. There was a *bona fide* intention to appeal before the expiration of the appeal period;
6. The Applicants informed the Respondent of their intention to appeal;

7. The Respondent was aware of the Applicants' intention to appeal;
8. The Respondent will not be unduly prejudiced by an extension of time;
9. There is merit in the appeal in the sense that there is an arguable ground of appeal;
 - a. The Court erred in law and made palpable and overriding errors respecting the order in which the issues before the Court were to be considered. This resulted in the application of faulty premises, both legal and factual, to those issues, which led to erroneous conclusions;
 - b. The Court erred in law and made palpable and overriding errors in applying the incorrect legal test to the question of substantial consolidation;
 - i. The Court erred in law and made palpable and overriding errors by accepting that a debt for the provision of services is a creditor asset "commingled" with the assets of the debtor.
 - ii. The Court erred in law and made palpable and overriding errors by conflating intercompany loan guarantees with intercompany debt;

- iii. The Court erred in law and made palpable and overriding errors by accepting, without sufficient written reasons, that a secured creditor (NPL) could have its assets taken and its security disregarded due to the claims of the unsecured creditors of other companies, which unsecured debts NPL did not guarantee.
- c. The Court erred in law and made palpable and overriding errors by applying the incorrect legal test in analyzing the Receiver's allocation in the twelfth report;
- i. The Court erred in law and made palpable and overriding errors by accepting, without analysis, the Receiver's discretion to allocate the proceeds from the sale of assets belonging to separate corporations as among those corporations.
 - ii. The Court erred in law and made palpable and overriding errors by accepting an irrelevant distinction between payments to the relevant credit facility and payment on the Receiver's borrowing charge, and the conclusion that payment of the borrowing charge wasn't payment of the guarantee.

- iii. The Court erred in law and made palpable and overriding errors by reading the word “deducting” into the guarantee.
- d. The Court erred in law and made palpable and overriding errors in finding that the intercompany debts owed by NPL could be set off against NPL’s subrogated rights;
- e. The Court erred in law and made palpable and overriding errors by finding that NPL and NEL be assigned into bankruptcy based on faulty premises and erroneous conclusions in the prior analysis;
- f. The Court erred in law and made palpable and overriding errors by failing to provide sufficient reasons on substantive points;
- g. The Court erred in law in finding that a portion of the Net Receivership Proceeds or the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement not be used to fund legal fees and disbursements incurred to Mr. Nygard in connection with the criminal charges laid against him in Ontario; and
- h. The Court made palpable and overriding errors in applying the facts to the law as it relates to finding that a portion of the Net Receivership Proceeds or the Preserved Proceeds held

pursuant to the NPL Proceeds Preservation Agreement not be used to fund legal fees and disbursements incurred to Mr. Nygard in connection with the criminal charges laid against him in Toronto, Ontario.

10. It is right and just in all of the circumstances that time for commencing the appeal be extended;
11. The interests of justice would not be served by precluding the Applicants from arguing their appeal; and
12. Such further and other grounds as the Applicants may advise and as this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. Affidavit of Liam O. Valgardson, affirmed March 25, 2022; and
2. Such further and other documentary evidence as the lawyers for the Applicants may advise and as this Honourable Court may permit.

Dated: March 25, 2022



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AND TO: THE SERVICE LIST

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