

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. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF
THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., c. C280

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

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,

Respondents.

NOTICE OF MOTION OF THE RECEIVER
(LANDLORD TERMS ORDER)
HEARING DATE: MONDAY, JUNE 1, 2020 at 10:00 a.m.
BEFORE THE HONOURABLE MR. JUSTICE EDMOND

Thompson Dorfman Sweatman LLP
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WINNIPEG CENTRE

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280

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Applicant,

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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,

Respondents.

NOTICE OF MOTION OF THE RECEIVER

Richter Advisory Group Inc. in its capacity as court-appointed receiver (in such capacity, the "**Receiver**") 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 (collectively the "**Debtors**", and any one of them, a "**Debtor**"), will make a motion before The Honourable Mr. Justice Edmond on Monday, the 1st day of June, 2020 at 9:00 a.m., or as soon after that time as the motion can be heard, at the Winnipeg Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR:

1. An Order under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “BIA”) and pursuant to the inherent jurisdiction of this Honourable Court, substantially in the form attached hereto as Schedule "A" (the “**Landlord Terms Order**”), *inter alia*:
 - (a) Abridging the time for service of this Notice of Motion and the materials filed in support of this motion, such that this motion is properly returnable on the stated hearing date, and dispensing with further service thereof;
 - (b) Establishing the Landlord Terms, as defined in paragraph 10 of the Sale Approval Order made by this Honourable Court on April 29, 2020 (the “**Sale Approval Order**”), in relation to the sale of the Debtors’ retail inventory and furniture, fixtures and equipment at the various retail store locations leased to the Debtors;
 - (c) Granting a charge (the “**Landlord’s Charge**”) over the Property, as defined in the Receivership Order made by this Honourable Court on March 18, 2020, as amended, in favour of the Landlords to secure the payment of monies for any unpaid rent for the period commencing March 18, 2020 up to and including the repudiation date of a Lease; and
 - (d) Approving the Second Report of the Receiver dated May 27, 2020 and the conduct, activities and accounts of the Receiver described therein, including the Receiver’s updated Interim Statement of Receipts and Disbursements.

2. If necessary, such further and other relief as the circumstances of this case may require, and as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. On March 18, 2020, this Honourable Court made the Receivership Order appointing the Receiver over all the assets, undertakings and properties of the Debtors, which appointment was subsequently amended (by that certain General Order made April 29, 2020 in these proceedings) in relation to assets, undertakings and properties of the Debtors Nygard Enterprises and Nygard Properties Ltd.
2. On April 29, 2020, this Honourable Court made the Sale Approval Order. Any capitalized terms used and not defined herein shall have the meanings ascribed thereto in the Sale Approval Order, the Consulting Agreement attached as Appendix "T" to the First Report of the Receiver dated April 20, 2020 (filed herein) and the Sale Guidelines attached as Schedule "A" to the Sale Approval Order.
3. The Sale Approval Order, *inter alia*, provides for and approves a process pursuant to which the Consultant, with the assistance of the Receiver, is authorized to conduct Sales contemplated by the Consulting Agreement in relation to, *inter alia*, the Merchandise and FF&E of the Debtors.
4. Paragraph 10 of the Sale Approval Order provides that the sale of Merchandise and FF&E in Stores shall not commence until further Order of this Honourable Court as to:

- (a) the Sale Commencement Date, the Sale Termination Date and/or the duration of the Sale;
- (b) the payment of rent in respect of the Sale Term;
- (c) the payment of rent, if any, in respect of the period from March 18, 2020 to the Sale Commencement Date;
- (d) the timing of delivery and period of notice of repudiation in relation to the Store leases;
- (e) the prescription, if any, of limits on the augmentation of Merchandise to the Stores for the purposes of the Sale; and
- (f) such other matters as may be required,

(collectively, the “**Landlord Terms**”), which Order may be made generally in relation to all Stores, or on a “per Store” basis.

5. Paragraph 11 of the Sale Approval Order provides that, not less than ten (10) days prior to the hearing date for the Order relating to the Landlord Terms, the Receiver shall provide information as to the Receiver’s proposed Landlord Terms by means of email delivery of a form of “Landlord Notice”.
6. The Receiver has worked closely with the Consultant to develop the Landlord Terms which are sensitive to the realities being experienced by Canadian tenants and Landlords as a result of the COVID-19 pandemic. In particular, the Landlord Terms

reflect the fact that, in accordance with applicable government regulations, Stores will be allowed to reopen at different times in different provinces and, depending on the nature and location of the Store, potentially at different times within the same jurisdiction.

7. The Receiver believes that the Landlord Terms will assist in maximizing the value of the Merchandise and FF&E for the benefit of all stakeholders. The Receiver also believes that it is crucial to commence the Sale as soon as reasonably possible in each jurisdiction in order to bring certainty to these proceedings, including for the employees of the Debtors who will be brought back to work for the purposes of the Sale.
8. The Receiver has developed the proposed Landlord Terms Order in consultation with counsel for Landlords for more than 60 (out of a total of 167) of the retail Store locations leased by the Debtors.
9. The proposed Landlord Terms were outlined in a form of "Landlord Notice" which was emailed to the Receiver's contacts for landlords on the Landlord Service List and Main Service List (both as attached to this Notice of Motion) on May 21, 2020 in accordance with paragraph 11 of the Sale Approval Order.
10. This Honourable Court has jurisdiction to make an order granting the Landlords' Charge.
11. The Applicant, as the primary secured creditor of the Debtors, is supportive of the proposed Landlord Terms Order.

12. The Consultant is supportive of the proposed Landlord Terms Order.
13. The proposed terms contained in the Landlord Terms Order are commercially reasonable and fair, and offer an appropriate level of protection to the Landlords in respect of claims for unpaid rent for the period commencing from the date of the Receivership Order.
14. Section 95 of *The Corporations Act*, C.C.S.M. c. C225.
15. The BIA, including sections 243 and 249.
16. Rules 3, 4, 6, 11 and 13 of the *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368.
17. Rules 2.03, 3.02, 16.04, 37 and 41.05 of the *Queen's Bench Rules*, M.R. 553/88, as amended.
18. Such further and other grounds as counsel for the Receiver may advise and as this Honourable Court may permit.

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

1. The First Report of the Receiver, dated April 20, 2020
2. The Supplementary First Report of the Receiver dated April 27, 2020
3. The Second Report of the Receiver dated May 27, 2020; and

4. Such further and other evidence as counsel for the Receiver may advise and this Honourable Court may permit.

May 27, 2020

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TO: THE ATTACHED SERVICE LIST

AND TO: THE LANDLORD SERVICE LIST

**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 -

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,

Respondents

SERVICE LIST

(as at May 27, 2020)

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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 -

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,

Respondents.

LANDLORD SERVICE LIST

(as at May 27, 2020)

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SCHEDULE "A"

File No. CI 20-01-26627

**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. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

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,

Respondents.

LANDLORD TERMS ORDER

Thompson Dorfman Sweatman LLP
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THE QUEEN'S BENCH

WINNIPEG CENTRE

THE HONOURABLE)
MR. JUSTICE EDMOND) Monday, the 1st day of June, 2020
)

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF THE *COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

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,

Respondents.

LANDLORD TERMS ORDER

THIS MOTION, made by Richter Advisory Group Inc. in its capacity as court-appointed Receiver (in such capacity, the “**Receiver**”) without security, of the assets, undertakings and properties of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd.,

NygaardProperties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the “**Debtors**”, or any one of them, a “**Debtor**”) as provided for in the Order of this Court pronounced on March 18, 2020 (and as further amended by the General Order of this Court pronounced April 29, 2020), for an Order, among other things, approving certain landlord terms and related relief, was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the Notice of Motion of the Receiver, the First Report of the Receiver dated April 20, 2020, and the Second Report of the Receiver dated May 27, 2020 (the “**Second Report**”), and on hearing the submissions of counsel for the Receiver, counsel for the Applicant, counsel for Peter Nygard and the Respondents, counsel for Doral Holdings Limited, KCAP Kingston Inc. and 2023011 Ontario Limited, counsel for Kingsway Garden Holdings Inc., Upper Canada Mall Limited and Crombie Developments Limited, and counsel for the interested retail landlord entities of Cushman & Wakefield Asset Services ULC, Morguard Investments Limited, Ivanhoe Cambridge Inc., SmartCentres Management Services Inc., RioCan REIT, Blackwood Partners Management Corporation, Choice Properties Limited Partnership and Springwood Land Corporation, no one appearing for any other person, although properly served as appears from the Affidavit of Service of Barbara Allan sworn May •, 2020, filed herein:

1. THIS COURT ORDERS that the time for service of the Notice of Motion of the Receiver and the Second Report is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.
2. THIS COURT ORDERS that capitalized terms not otherwise defined herein shall

have the meaning ascribed to them in the Consulting Agreement attached as Appendix “T” to the First Report as approved by that certain order (the “**Sale Approval Order**”) of this Honourable Court made April 29, 2020, the Sale Approval Order, and the Sale Guidelines attached as Schedule “A” to the Sale Approval Order.

3. THIS COURT ORDERS that the Sale Commencement Date shall be determined on a “per Store” basis, and:

- (a) in relation to a Store that is lawfully entitled to be open to the public (taking into account the relevant public health and business closure orders applicable to such Store) as at the date of the making of this Order, the Sale Commencement date shall be the date that is the earlier of (i) the date on which the Consultant and/or employees of the Debtors actually access such Store for purposes related to the Sale and (ii) the date which is seven (7) days after the date of the making of this Order; and
- (b) in relation to a Store that is not lawfully entitled to be open to the public (taking into account the relevant public health and business closure orders applicable to such Store) as at the date of the making of this Order, the Sale Commencement Date shall be the date that is the earlier of (i) the date on which the Consultant and/or employees of the Debtors actually access such Store for purposes related to the Sale and (ii) the date which is seven (7) days after the Store is so lawfully entitled to be open to the public.

4. THIS COURT ORDERS the duration of the Sale at a Store shall not exceed sixteen (16) weeks commencing on the Sale Commencement Date at such Store, and

the Sale Termination Date shall be determined on a “per Store” basis, and shall, in relation to each Store, be that date which is the earlier of (i) the effective date of repudiation (the “**Repudiation Date**”) of the Lease for such Store and (ii) the date which is sixteen (16) consecutive weeks after the Sale Commencement Date for such Store.

5. THIS COURT ORDERS that the Receiver or the Consultant shall be permitted to repudiate a Lease by providing to the Landlord for the applicable Store not less than fifteen (15) days’ prior notice in writing of its intention to do so, which notice shall set out the Repudiation Date and which may be sent by electronic transmission (email) to the email address of the Landlord described in the Landlord Service List (as attached to the Receiver’s Notice of Motion dated May 27, 2020, and as may be amended thereafter by the Receiver) and/or to the email address of counsel to the Landlord described in the Main Service List (as attached to the Receiver’s Notice of Motion dated May 27, 2020, and as may be amended thereafter by the Receiver).

6. THIS COURT ORDERS that the Receiver and the Consultant shall be permitted to (i) transfer Merchandise between Stores in the course of the Sale for the purpose of managing inventory at Stores, and (ii) supplement the Merchandise at each Store (or at such Stores as the Consultant may select) by adding Merchandise: (A) currently warehoused in the Debtors’ distribution centres in Canada; and/or (B) any further Merchandise which is on order or owned by the Debtors and located within Canada as at the date of the Receivership Order; and/or (C) as may be agreed between the Receiver and a Landlord. For clarity, the Receiver and the Consultant shall not be permitted to augment the Merchandise at any Store by adding Merchandise warehoused in the Debtors’ United States distribution centres as of the date of the Receivership Order.

7. THIS COURT ORDERS that the Receiver shall fund the Debtors in such amounts as may be required to pay to Landlords, and the Debtors shall pay to Landlords, all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under its lease, but for greater certainty, excluding accelerated rent or penalties, fees or other charges and costs arising as a result of the insolvency of the Debtors and the abandonment, if any, of FF&E and signage) or as otherwise may be negotiated between the Receiver and the applicable Landlord from time to time ("**Rent**"), for the period commencing on the Sale Commencement Date twice-monthly in equal payments on the first and fifteenth day of each month, in advance but not in arrears (save and except for any component of Rent comprising percentage rent which shall be calculated and paid in accordance with the terms of the applicable Lease), up to and including the Repudiation Date of the Lease for such Store. On the date of the first such payment, any component of Rent relating to the period from and including the Sale Commencement Date for such Store shall also be paid.

8. THIS COURT ORDERS that with respect to Rent, Landlords shall be entitled to and are hereby granted a charge (the "**Landlords' Charge**") on the Property (as defined in the Receivership Order, as amended), as security for the payment of monies for any unpaid Rent for the period commencing March 18, 2020 up to and including the Repudiation Date of a Lease ("**Post Filing Rent**") and that the Landlords' Charge shall form a charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, (each, an "**Encumbrance**"), in favour of any Person, but subordinate in priority to (i) the Receiver's Charge and the Receiver's

Borrowings Charge (both as defined in the Receivership Order), (ii) any Encumbrance in favour of the Applicant, (iii) any Encumbrance in favour of a secured creditor who would be materially affected by this Order and who was not given notice of this motion, (iv) the charges as set out in sections 14.06(7), 81.4(4) ,and 81.6(2) of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**"), (v) any valid claims to the Property of the Debtors as asserted pursuant to section 81.1 of the BIA; and (vi) any valid priority charges which exist in relation to provincial sales taxes and taxes pursuant to the *Excise Tax Act* (Canada).

9. THIS COURT ORDERS that the amount of Post Filing Rent subject to the Landlords' Charge in favour of any particular Landlord shall be determined on a basis consistent with the applicable Lease and that the Landlords' Charge shall be shared by affected Landlords ratably in accordance with the amounts of their respective unpaid Post Filing Rent. In the event of any dispute between a Landlord and the Receiver as to the Post Filing Rent payable to a Landlord, this Honourable Court shall have the authority to determine such dispute on a summary basis on a motion made by the Receiver or the applicable Landlord, as the case may be.

10. THIS COURT ORDERS that the Landlords' Charge shall not be enforced without the written consent of the Receiver, or leave of this Honourable Court.

11. THIS COURT ORDERS that the filing, registration or perfection of the Landlords' Charge shall not be required, and that the Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

12. THIS COURT ORDERS that the Landlords' Charge shall not be rendered invalid or unenforceable as to the rights and remedies of the Landlords entitled to the benefit of the Landlords' Charge and the Landlords shall not otherwise be limited or impaired in any way by: (i) any application(s) for bankruptcy order(s) issued pursuant the BIA as against any one or more of the Debtors, or any bankruptcy order made pursuant to such applications; (ii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA by any one or more of the Debtors; (iii) any deemed bankruptcy of any one or more of the Debtors; and (iv) the provisions of any federal or provincial statutes. Further, any payments made to Landlords pursuant to the Landlords' Charge do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions pursuant to the BIA or any other applicable law.

13. THIS COURT APPROVES the Second Report and the activities of the Receiver and its counsel as described therein, including the Receiver's Interim Statement of Receipts and Disbursements and the interim accounts of the Receiver and its counsel as reflected in the Second Report.

14. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada.

15. THIS COURT HEREBY REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Consultant, the Receiver and their respective agents in carrying out the terms of this Order. All courts, tribunals,

regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Consultant and the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Consultant and the Receiver and their respective agents in carrying out the terms of this Order.

June 1, 2020

I, G. BRUCE TAYLOR OF THE FIRM THOMPSON DORFMAN SWEATMAN LLP, HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES: THE APPLICANT, THE RESPONDENTS, MR. PETER NYGARD, DORAL HOLDINGS LIMITED, KCAP KINGSTON INC., 2023011 ONTARIO LIMITED, KINGSWAY GARDEN HOLDINGS INC., UPPER CANADA MALL LIMITED, CROMBIE DEVELOPMENTS LIMITED AND THE INTERESTED RETAIL LANDLORD ENTITIES OF CUSHMAN & WAKEFIELD ASSET SERVICE ULC, MORGUARD INVESTMENTS LIMITED, IVANHOE CAMBRIDGE INC., SMARTCENTRES MANAGEMENT SERVICES INC., RIOCAN REIT, COMINAR REIT, BLACKWOOD PARTNERS MANAGEMENT CORPORATION, CHOICE PROPERTIES LIMITED PARTNERSHIP AND SPRINGWOOD LAND CORPORATION

AS DIRECTED BY THE HONOURABLE MR. JUSTICE J.G. EDMOND