

**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.

**SUPPLEMENTARY MOTION BRIEF OF
THE RECEIVER
(LANDLORD TERMS)**

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I. LIST OF FURTHER AUTHORITY

Tab

1. Order of Mr. Justice Morawetz pronounced January 23, 2012 in *Premium Products Inc. v. Bernhard et al.*, Ontario Superior Court of Justice File No. CV-11-9343-00CL;

II. POINTS TO BE ARGUED

1. This Supplementary Brief is being filed on behalf of the Receiver in response to the Motion Brief of the Respondents relating to the proposed Landlords' Charge that was filed and served on the morning of Sunday, May 31, 2020. Capitalized terms not otherwise defined herein shall have the meaning given to them in the initial Motion Brief of the Receiver in support of the Landlord Terms Order, which was filed on May 28, 2020.

2. At the outset, it is useful to again draw this Honourable Court's attention to the decision in *Third Eye Capital Corporation v. Ressources Dianor Inc.*, 2019 ONCA ["*Third Eye*"] 508, which is found at Tab 4 to the initial Motion Brief of the Receiver in support of the Landlord Terms Order. As noted, this case illustrates and supports the broad jurisdiction available to this Court in connection with receivership proceedings under the *Bankruptcy and Insolvency Act*. In addition to the quotations highlighted in the initial Motion Brief, the Receiver also notes the following statements made by the Court in *Third Eye*:

The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives ...

...

Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could “direct an interim receiver . . . to . . . take such other action as the court considers advisable”, permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did.

He wrote, at p. 185:

It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what “justice dictates” but also what “practicality demands.” It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

Third Eye Capital Corporation v. Ressources Dianor Inc., 2019 ONCA 508, paras. 43, 52, Tab 4 of Receiver’s Initial Motion Brief

3. In particular, with respect to the issue of the ability and jurisdiction of this Honourable Court to grant a charge in the nature of the proposed Landlords’ Charge, the Receiver would respectfully refer to the Order of the Ontario Superior Court of Justice on January 23, 2012 in *Premium Products Inc. v. Bernhard et al.*, Court File No. CV-11-9343-00CL, wherein Justice Morawetz previously granted a charge in favour of a Landlord within the context of a receivership proceeding.

Order of Mr. Justice Morawetz pronounced January 23, 2012 in *Premium Products Inc. v. Bernhard et al.*, Ontario Superior Court of Justice File No. CV-11-9343-00CL, Tab 1

4. In general terms, firstly, the position of the Respondents described in the Respondents' Brief is founded on the premise that the access of the Receiver to proceeds of assets of NPL included in the receivership, is limited to "US\$20 million plus costs." No such order has been made and no such limit exists.

5. The Credit Agreement describes the limit of the *Lenders' recourse* to proceeds from the realization of NPL assets to US\$20 million "after all costs and expenses, including enforcement costs." This determines the limit of the priority of the *Lenders* to proceeds of realization of NPL assets. It does not limit or otherwise deal with the availability of proceeds realized by the Receiver on assets of NPL in excess of "US\$20 million plus costs" for the payment of other creditors of NPL.

6. By the Receivership Order, the Receiver is appointed as receiver of the Property. The definition of Property, as amended by paragraph 2 of the General Order, includes such property, assets and undertaking of NEL and NPL in which the Applicant has an interest pursuant to the Credit Agreement and related loan documents. This is a description of assets, and as it is in respect of the assets of each of the Respondents, the definition of Property is properly not limited to any dollar value of the proceeds of such assets.

7. It is common in receiverships commenced by secured creditors that there is some amount (which may be the whole amount of the secured debt or some other amount) in respect of which the secured creditor has priority. Once proceeds of realization of property over which the receiver is appointed have reached that limit, the Receiver

does not just stop the Court-ordered process and give the rest of the proceeds to the debtor ignoring the rights of other creditors. Instead, the Receiver determines what other debts and obligations are owed by the debtor, and the priority of those, and seeks the Court's authorization to use the balance of the proceeds of realization towards satisfaction of those other debts and obligations.

8. Such is presently, and in our submission should be, the case with this receivership and the treatment of proceeds of realization on NPL assets.

9. The Supplement to the Second Report of the Receiver indicates that, based on the books and records of the Respondents, NPL may have very substantial liabilities to creditors other than the Lenders, including by reason of very substantial intercompany debts owing by NPL to Nygard International Partnership, the primary operating entity of the Nygard Group. In the Supplement, the Receiver acknowledges that these debts need to be reviewed and analyzed.

10. By the Receivership Order, the Court has already granted the Receiver's Charge (paragraph 21) and the Receiver's Borrowings Charge (paragraph 24), both of which create fixed and specific charges over the Property, again, without limiting the amount of proceeds of NPL (or NEL) assets to be included in the said charges or the Property.

11. To the extent that there may be allocation or marshalling issues in relation to the application of proceeds of Property, those are not before the Court today; should not interfere with the granting of the urgent relief sought by the Receiver in the within motion, and can be addressed by the Court at a later date. As a practical matter, in any

event, it has not yet been determined whether the proceeds from the realization of NPL assets will exceed the amount of “US\$20 million plus costs.”

12. The Respondents are effectively attempting to redefine “Property” to impose limits on the availability to the Receiver of proceeds of NPL Property. Such limits were not raised or ordered in the course of the granting of the Receivership Order (in relation to the definition of Property and the granting of the Receiver’s Charge and the Receiver’s Borrowings Charge) and were not raised in the course of the granting of the General Order, in which the matter only of the nature of the NPL assets was addressed, and not any limit to the contribution to the Receivership from the proceeds of those assets.

13. In general terms, secondly, the position of the Respondents is premised on the suggestion that the Receiver and the Landlords should rely on “long standing case law” and somehow attempt to negotiate with 165 landlord separately, or some way debate or impose outcomes, based on the terms of their existing leases, and, we assume, pay some landlords in whole, some in part, or some not at all, depending on the terms of each lease, and after considering whether they address the matter of whether the landlord or the tenant should ultimately bear the burden of the COVID 19 pandemic and the resulting health and business closure orders and regulations. The suggestion is that the Receiver should do so, rather than work cooperatively with landlords on a solution (the Landlords’ Charge) that, to the Receiver and the Landlords, fairly, or by necessity, balances that that burden.

14. The process of interpreting each lease and negotiating rent terms with each landlord, as opposed to achieving a smooth and consensual liquidation process with the

landlords in the midst of the unprecedented economic and health crisis caused by the COVID-19 pandemic, is not only absurd, but it goes against the very ethos of Canadian insolvency proceedings – attempting to use the framework of insolvency legislation to solve complex, unique and difficult problems. Such a process would engender disagreement, cause substantial delay in commencing the sale process, and create very substantial cost, to the detriment of all stakeholders and the sale process. All the while that such a process is unfolding, more rent claims and issues would be accruing, and the landlords would be delayed in having the sale process get going and get completed, so that they can deal with their premises going forward.

15. The retail store inventory liquidation sale is central to the realization of inventory assets in the receivership, and the interests of all parties are served by a cooperative solution that allows the sale process to commence in a consensual and reasonably uniform manner as jurisdictions relax retail store closure regulations.

16. It is critical to the retail store inventory liquidation sale that the Court make an Order at the June 1, 2020 hearing setting the Landlord Terms. As set out in the Second Report, the Receivership has been running at a deficit since the Appointment Date, as the Liquidation Sale could not commence due to the COVID-19 pandemic. The parties with the principal financial interests in the Landlord Terms (i.e. approximately 100 landlords, the Receiver and the Lenders) have all agreed to the compromise described in the Second Report and support the making of the Landlord Terms Order in the form and containing the terms described in the Landlord Terms Order attached as Schedule “A” to the within Notice of Motion.

17. There is no “long standing case law” cited in the Respondents’ Brief standing as authority for the treatment of the interests of landlords and tenants impacted by a pandemic and government business closures that prevent tenants from accessing leased premises, and prevent landlords from enabling tenant’s access, all at no fault of either the landlord or the tenant.

18. The suggestions in the Respondents’ Brief that the Receiver has failed to provide sufficient information or that there is not the proper legal basis, are, respectfully, disingenuous. The sole concern of the Respondents is to try to limit the exposure of NPL asset proceeds to such a charge. As noted above, no such limitation exists and, in any event, the matter of allocation of proceeds is not a matter before the Court on the within motion and, if necessary, can be addressed in future in an appropriate hearing.

19. In general terms, thirdly, the Respondents’ Brief makes confusing references to occupation rent and bankruptcy law. The Receiver and the Landlords have agreed in the unique circumstances of the COVID-19 pandemic to the requested Landlord’s Charge to address “COVID-period” rent (and, in fact, any “Post-filing Rent” that is unpaid). This will accommodate the retail inventory liquidation sale going forward and allow it to commence immediately where permitted. What is confusing, is that, if the Receiver was able to fund payment of “occupation rent” during the “Covid period”, it would have to borrow to do so. If it borrowed to do so, the borrowings would be added to the existing Receiver’s Borrowings Charge, which charges the Property and ranks in priority to the interests of the Respondents. It is unclear how such a suggestion either benefits the sale process or the Respondents.

20. The Receiver also notes that in respect of the limited recourse guarantee of NPL, the wording of the Credit Agreement (referenced at paragraph 7 of the Respondents' Brief) specifically states that it is limited to a "realized value *after all costs and expenses, including enforcement costs*" of US \$20 million (emphasis added). The language as it relates to costs (including enforcement costs) is broad. With respect, paying the landlords of the retail premises for the use and occupation of their stores was clearly a foreseeable cost in connection with a receivership of the Nygard business. Thus, there is no reason why those costs (in the form of the Landlords' Charge) should not attach to the assets of NPL that were provided as security to the Lenders. In any event, as noted above, the issue of the extent to which Landlords' Charge may apply to the proceeds of NPL Property can be dealt with at a future date.

21. In response to certain specific points included in the Respondents' Brief:
- (a) In paragraph 6 of the Respondent's Brief, it is asserted that "NEL did not pledge its equity interest in NPL to the Lenders." NEL has admitted its insolvency by the filing of Notice of Intention to Make a Proposal, and, accordingly, it appears not to have any equity value;
 - (b) The wording of the Landlord Terms Order as to the affected store locations is not ambiguous at all. To the contrary, the Landlord Terms Order extends solely to "Stores" and references defined terms in the Consulting Agreement. The Consulting Agreement defines "Stores" to mean retail store locations described in a certain "Exhibit 1B", which lists only locations in Canada. The Landlord Terms Order does not extend to locations (used for any purpose) in

Gardena, and does not extend to distribution centres located in Canada. The amendment to the Landlord Terms Order suggested in paragraph 11 of the Respondents' Brief is unnecessary, and may lead to confusion as to whether Canadian distribution centre locations are, by implication, somehow included in the Landlord Terms Order;

- (c) As to paragraph 14(a) and 19 of the Respondent's Brief, charges are commonly and invariably granted (e.g. the Receiver's Charge and the Receiver's Borrowings Charge in these proceedings) at a time when the outcome of the insolvency proceeding is unknown or uncertain;
- (d) As to paragraph 14(c), the granting of the Landlord Charge does not affect the "bargain" made by the Lenders;
- (e) As to paragraph 15(c), the Receiver's Second Report estimates the unpaid post-filing rent to be approximately \$2.7 million. This amount is likely to increase based on the timing of sale commencement as jurisdictions "open up";
- (f) As to paragraph 24, the Receiver "is the Respondents" for the purposes of arranging and confirming the Landlord Terms, and has no responsibility to discuss those terms with the Nygard parties or their counsel. This is not a debtor in possession scenario and the Receiver has full authority to deal with matters such as negotiating Landlord Terms on behalf of the Debtors. As stated at paragraph 19 of the Judgment on the Receivership Application: "The further evidence that has been filed since March 13, 2020, satisfies me that

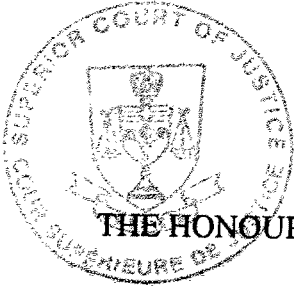
the Nygard Group has not been acting in good faith and with due diligence. I am also satisfied that the Nygard Group cannot be left as a debtor in possession and the proposal process cannot continue.”;

- (g) As to paragraph 26, as noted above, the conduct of the receivership as to proceeds of NPL Property is not limited to satisfying “limited guarantee obligations to White Oak” and NPL’s BIA proposal process was stayed based on a finding by this Court that NPL (and the other Respondents) were not proceeding with that process in good faith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of May,
2020.

THOMPSON DORFMAN SWEATMAN LLP

Per: “G. Bruce Taylor”
G. Bruce Taylor / Ross A. McFadyen
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.

)

MONDAY, THE 23rd

)

JUSTICE MORAWETZ

)

DAY OF JANUARY, 2012

BETWEEN:

PREMIUM PRODUCTS INC.

Plaintiff

- and -

**DENNIS BERNHARD, TENTH POWER INC., HARVEY GRIGGS, JOHN
GRAHAM, ROBERT STERIJEVSKI, QUIG TINGLEY and PREMIUM
TECHNOLOGIES HOLDING INC.**

Defendant

AND BETWEEN:

**DENNIS BERNHARD, HARVEY GRIGGS, JOHN GRAHAM,
ROBERT STERIJEVSKI, QUIG TINGLEY and
PREMIUM TECHNOLOGIES HOLDING INC.**

Plaintiffs by Counterclaim

-and-

**PREMIUM PRODUCTS INC., VISION INC., STRONGCO LTD.,
ELIAS FRANKELY MANCEBO, ERNESTO ALVEREZ FELIPE,
MARCELO HERNANDEZ, MARISA HERNANDEZ and
RAMON HERNANDEZ**

Defendants by Counterclaim

LIQUIDATION ORDER

THIS MOTION, made by BDO Canada Limited in its capacity as the Court-appointed receiver (the "Receiver") of the assets, undertakings, and properties of Premium Products Inc. (the "Debtor") acquired for, or used in relation to the business carried on by the Debtor for an order approving the liquidation proposal dated December 23, 2011 (the "Hilco Proposal"), and

submitted by Hilco Asset Sales Canada (“Hilco”), and authorizing the Receiver to enter into a liquidation services agreement with Hilco and other relief was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Second Report of the Receiver dated January 20, 2012 (the “Second Report”), and on hearing the submissions of counsel for the Receiver, counsel for 1654947 Ontario Inc., counsel for the Debtor and counsel for Dennis Bernhard, Harvey Griggs, John Graham, Robert Sterijevski and Premium Technologies Holdings Inc., no one appearing for any other person on the service list, although properly served as appears from the affidavit of Erika Leslie sworn January 20, 2012, filed:

1. **THIS COURT ORDERS** that the Hilco Proposal be and is hereby approved, and the Receiver is hereby authorized to enter into a liquidation services agreement with Hilco (the “Liquidation Services Agreement”), consistent with the terms of the Hilco Proposal, specifically the net minimum guarantee structure set out on page 4 of the Hilco Proposal, together with any amendments thereto deemed necessary and appropriate by the Receiver, as well as any other documents and instruments that may be necessary or desirable to carry out the liquidation of the assets listed in Exhibit “A” to the Hilco Proposal (the “Manufacturing Assets”) pursuant to the terms of the Hilco Proposal (the “Transactions”).
2. **THIS COURT ORDERS AND DECLARES** that upon Hilco completing the sale of any of the Manufacturing Assets to a purchaser, and upon receipt of the purchase price by Hilco and delivery by Hilco of a bill of sale or similar evidence of purchase to the purchaser (the “Purchaser Bill of Sale”) all of the Debtor’s right, title and interest in and to the Manufacturing Assets described in the Purchaser Bill of Sale shall vest absolutely in such purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “Claims”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Brown dated September 30, 2011; and (ii) all charges, security interests or claims evidenced by registrations pursuant to

the *Personal Property Security Act* (Ontario) or any other personal property registry system, with the exception of the security interests evidenced by registrations pursuant to the PPSA in favour of GFCO (No. 1) Limited, Xerox Canada Ltd. and Chillers Inc.

3. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Liquidation Services Agreement from the sale of the Manufacturing Assets shall stand in the place and stead of the Manufacturing Assets, and that from and after delivery of the Purchaser Bill of Sale all Claims shall attach to the net proceeds from the sale of the Manufacturing Assets with the same priority as they had with respect to the Manufacturing Assets immediately prior to the sale, as if the Manufacturing Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

4. **THIS COURT ORDERS** that, notwithstanding:


- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Manufacturing Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a ~~settlement~~, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

5. **THIS COURT ORDERS AND DECLARES** that the Transactions are exempt from the application of the *Bulk Sales Act* (Ontario).

6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

7. **THIS COURT ORDERS** that 857528 Ontario Inc. (the "Landlord") shall be paid \$51,200 per month for rent (including realty taxes) ("Rent"). The Landlord shall be entitled to and is hereby granted a charge (the "Landlord Charge") on the Property [as such term is defined in the Order of Justice Brown dated September 30, 2011 granted in these proceedings (the "Appointment Order")] to secure payment of the Rent. The Landlord Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances [including the Receiver's Charge and the Receiver's Borrowings Charge (as such terms are defined in the Appointment Order) and any other charges granted in these proceedings]. The Landlord Charge shall be subordinate only to the reasonable costs and fees of Hilco incurred in connection with the liquidation of the Property.



Natasha Brown
Registrar

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JAN 23 2012

NB

PREMIUM PRODUCTS INC.
Plaintiff

and
DENNIS BERNARD, et al.
Defendants

Court File No: CV-11-9343-00CL

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

ORDER

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