

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
(E/B SETTLEMENT APPROVAL ORDER)
HEARING DATE: MONDAY, SEPTEMBER 14, 2020 at 9:00 a.m.
BEFORE THE HONOURABLE MR. JUSTICE EDMOND

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Respondents.

NOTICE OF MOTION OF THE RECEIVER –
E/B SETTLEMENT APPROVAL ORDER

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. (“**NEL**”), Nygard Properties Ltd. (“**NPL**”), 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 14th day of September, 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 “**E/B Settlement Approval 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) Approving the transactions (the “**Transactions**”) (including, without limitation, the mutual settlement of claims, the provision of releases and the sale of inventory) as contemplated by that certain Settlement Agreement (the “**E/B Settlement Agreement**”) made as at September 4, 2020 among the Receiver (on behalf of the Debtors other than as to certain actions of NEL and NPL in relation to providing certain real property mortgages as described in the E/B Settlement Agreement), Edson’s Investments Inc. (“**Edson’s**”), Brause Investments Inc. (“**Brause**”, and together with Edson’s, “**E/B**”), NPL, and Peter J. Nygard (“**PJN**”) pursuant to the Receiver’s powers under paragraph 6(j) of the Order made herein on March 18, 2020, as amended (the “**Receivership Order**”) and the Order made herein on April 29, 2020 (the “**Sale Approval Order**”), including paragraph 4 thereof;
 - (c) Confirming the vesting of title to the Purchased Inventory (as defined in the E/B Settlement Agreement) in Edson’s and Brause, pursuant to the Sale Approval Order, upon closing of the transactions contemplated by the E/B Settlement Agreement;

- (d) Sealing the Confidential Appendix to the Seventh Report of the Receiver, to be filed (the “**Seventh Report**”);
- (e) Unsealing:
 - i. The Confidential Appendices to the Third Report of the Receiver dated June 22, 2020, which Confidential Appendices were sealed by Order (the “**Notre Dame Approval and Vesting Order**”) made by this Honourable Court on June 30, 2020; and
 - ii. The Confidential Appendices to the Sixth Report dated August 3, 2020, which Confidential Appendices were sealed by Order (the “**Niagara Approval and Vesting Order**”) made by this Honourable Court on August 10, 2020.
- (f) Approving the Seventh Report and the conduct, activities and accounts of the Receiver and its counsel described therein.

- 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 (including the assets dealt with in the Settlement Agreement), 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 NEL and NPL. The assets,

undertakings and properties of the Debtors subject to the Receivership Order are hereinafter referred to as the “**Property**”.

2. Pursuant to the Receivership Order, this Honourable Court empowered and authorized the Receiver to, *inter alia*: settle, extend or compromise any indebtedness owing to or by the Debtors.
3. PJN is, or was at all material times, the principal of the Debtors who are part of a larger group of entities (the “**Nygaard Organization**”).
4. NPL is a limited recourse guarantor under the Credit Agreement (the “**Credit Agreement**”) dated December 30, 2019 between the Applicant and the Debtors. NPL is the owner of certain property located at 40 Fieldstone Drive, Vaughan, Ontario (the “**Fieldstone Property**”) and the lessee of certain real property located at Falcon Lake, Manitoba (the “**Falcon Lake Cottage**”).
5. Brause owns certain real property located at 312 & 332 East Rosecrans Avenue, Gardena, California (“**East Rosecrans**”). Edson’s owns certain real property located at 14401 South San Pedro Street, Gardena, California (“**14401 South San Pedro**”) and 14421 South San Pedro Street, Gardena, California (“**14421 South San Pedro**” and together with East Rosecrans and 14401 South San Pedro, the “**California Properties**”).
6. The Debtors carried on business and stored Property at the California Properties.
7. On or about May 13, 2020, E/B filed a Notice of Motion making certain claims (the “**California Property Claims**”) regarding the payment of rent and certain other costs from the Receiver respecting the use of the California Properties by the Debtors and/or the Receiver.

8. The Receiver has made claims (the “**Payroll Funds Claims**”) for the repayment or reimbursement by Edson’s of certain payroll funds (the “**Payroll Funds**”) pursuant to an undertaking to the Court on March 12, 2020, an Order of the Court made March 13, 2020 and the Order (the “**General Order**”) made on April 29, 2020.
9. The Receiver has also made claims (the “**Utility Payment Claims**” and together with the California Property Claims and the Payroll Funds Claims, the “**Financial Claims**”) for payment or reimbursement by Edson’s of certain utility payments made on utilities accounts of Edson’s on March 16, 2020 and March 17, 2020.
10. As reflected in the reports of the Receiver filed with the Court, including the Seventh Report, to be filed, the Receiver has, since being appointed by the Court, engaged in efforts to sell the Property, including certain inventory held in the California Properties. In addition, the Receiver has made efforts to resolve the Financial Claims arising as between E/B and the Debtors and/or the Receiver.
11. Pursuant to the Sale Approval Order, this Honourable Court authorized, *inter alia*, the sale of the assets described in the Consulting Agreement (as defined in the Sale Approval Order), which assets include the Purchased Inventory (as defined in the E/B Settlement Agreement).
12. The Receiver, E/B, NPL and PJN have entered into the E/B Settlement Agreement, which provides for, *inter alia*:
 - (a) the sale of certain Purchased Inventory (as defined in the E/B Settlement Agreement) by the Consultant, as agent for the Receiver, to E/B;

- (b) the payment of certain amounts by or on behalf of E/B to the Receiver in respect of the Financial Claims and the purchase of the Purchased Inventory;
- (c) an acknowledgment by the Receiver of its agreement that the Fieldstone Property is not “Property” for the purposes of the Receivership Order and its understanding that the Falcon Lake Cottage was not intended to be included as collateral securing repayment and other obligations of the Debtors pursuant to the Credit Agreement (as defined in the Receivership Order);
- (d) the provision of registrable real property mortgages of the Fieldstone Property and the Falcon Lake Cottage by NPL in favour of E/B for the specific purpose of securing repayment of amounts paid by E/B pursuant to the E/B Settlement Agreement;
- (e) the mutual full and final settlement, release and conclusion of all claims back and forth as between White Oak Commercial Financial, LLC, and Second Avenue Capital Partners, LLC, (together, the “**Lenders**”) and certain related parties on the one hand, and PJN, E/B, the Debtors (solely to the extent of claims of the Debtors against the Lenders) and entities forming part of the Nygard Organization, on the other hand, as more particularly described in the “Lender/Nygar Organization Mutual Release Agreement” attached as Schedule “D” to the E/B Settlement Agreement;
- (f) the mutual full and final settlement, release and conclusion as between E/B and the Receiver (on behalf of the Debtors) of all claims back and forth which are directly related to the business and affairs of E/B, as more particularly described in the

“E/B/Receiver Release Agreement” attached as Schedule “E” to the E/B Settlement Agreement; and

- (g) the full and final release by PJN in favour of the Receiver and the Debtors for any and all claims as more particularly described in the “PJN Release to Receiver” attached as Schedule “F” to the E/B Settlement Agreement.

13. The E/B Settlement Agreement and the Transactions contemplated therein are subject to and conditional upon obtaining the approval of this Honourable Court as to the E/B Settlement Agreement by on or before September 14, 2020. Approval by this date is critical to the Settlement Agreement and Transactions contemplated therein as further steps are required to obtain recognition of the E/B Settlement Approval Order (if made by this Honourable Court) in the Chapter 15 proceedings in the US, all in a time frame consistent with certain deadlines prescribed by the E/B Settlement Agreement relating to occupation of the California Properties.
14. The sale of the Purchased Inventory has been authorized by the Sale Approval Order and pursuant to paragraph 4 of the Sale Approval Order, upon the closing of the inventory purchase transaction contemplated in the E/B Settlement Agreement, E/B will purchase the Purchased Inventory free and clear of any Encumbrances (as defined in the Sale Approval Order), which Encumbrances will attach instead to the proceeds of the sale in the same order and priority as they existed immediately prior to such sale. E/B seeks specific confirmation of such vesting by means of an Order in this motion.
15. The Receiver has determined that the E/B Settlement Agreement and the Transactions contemplated therein are commercially fair and reasonable, and the Receiver and

Consultant have not acted improvidently in entering into the E/B Settlement Agreement with E/B, NPL and PJN.

16. Court approval of the E/B Settlement Agreement and the related releases will bring an end to a significant amount of litigation in the Receivership Proceedings, result in additional funds in the estate and provide the Receiver, as a Court Officer, the certainty required to complete remaining realizations and distributions for the benefit of all stakeholders.
17. The Lenders as the primary secured creditor with an interest in the Property that is the subject of the E/B Settlement Agreement and in the “Lender/Nygaard Organization Mutual Release Agreement”, is supportive of the E/B Settlement Agreement.
18. The information as to the Settlement Amount, the Retainer Funds, the Lerner Funds, the Inventory Funds (each as defined in the E/B Settlement Agreement) and the prices to be paid for the Purchased Inventory, contained in the Confidential Appendix to the Seventh Report is sensitive commercial information, and a sealing order is necessary as there is a real and substantial risk of harm to the interests of E/B and stakeholders in this proceeding in the event such information is disclosed to the public in advance of the completion of the Transactions contemplated by the E/B Settlement Agreement.
19. The salutary effects of a temporary sealing order with respect to the Confidential Appendix outweighs any considerations relating to the public interest in open and accessible court proceedings.
20. As to the request to unseal certain Confidential Appendices, there appears to no longer be a real and substantial risk of harm to the interests of any party by disclosing the contents of said Confidential Appendices to the public.

21. Paragraph 6(j) of the Receivership Order and paragraph 4 of the Sale Approval Order.
22. Section 95 of *The Corporations Act*, C.C.S.M. c. C225.
23. The BIA, including sections 243 and 249.
24. Rules 3, 4, 6, 11 and 13 of the *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368.
25. Rules 2.03, 3.02, 16.04, 37 and 41.05 of the *Queen's Bench Rules*, M.R. 553/88, as amended.
26. 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 Second Report of the Receiver dated May 27, 2020;
3. The Third Report of the Receiver dated June 22, 2020;
4. The Fourth Report of the Receiver dated June 27, 2020;
5. The Fifth Report of the Receiver dated July 6, 2020;
6. The Sixth Report of the Receiver dated August 3, 2020;
7. The Seventh Report of the Receiver including the Confidential Appendix thereto; and

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

September 10, 2020

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Respondents

SERVICE LIST

(as at September 10, 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.

E/B SETTLEMENT APPROVAL ORDER

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THE QUEEN'S BENCH

WINNIPEG CENTRE

THE HONOURABLE)
MR. JUSTICE EDMOND)
)

• the • day of September, 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

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Respondents.

E/B SETTLEMENT APPROVAL 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.(“**NEL**”), Nygard Properties Ltd.(“**NPL**”), 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International

Partnership (collectively, the “**Debtors**”) as provided for in the Order of this Court pronounced on March 18, 2020 (the “**Receivership Order**”) (and as further amended by the General Order of this Court pronounced April 29, 2020), for, *inter alia*, an Order approving that certain Settlement Agreement (the “**E/B Settlement Agreement**”) made as of September 4, 2020 among the Receiver (on behalf of the Debtors other than as to certain actions of NEL and NPL in relation to providing certain real property mortgages as described in the E/B Settlement Agreement), Edson’s Investments Inc. (“**Edson’s**”), Brause Investments Inc. (“**Brause**”, and together with Edson’s, “**E/B**”), NPL, and Peter J. Nygard (“**PJN**”), and approving and authorizing the transactions (the “**Transactions**”) (including, without limitation, the mutual settlement of claims, the provision of releases and the sale of inventory) as contemplated by the E/B Settlement Agreement as referenced in the Seventh Report of the Receiver dated September 10, 2020 (the “**Seventh Report**”), 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, the Second Report of the Receiver dated May 27, 2020, the Third Report of the Receiver dated June 22, 2020, the Fourth Report of the Receiver dated June 17, 2020, the Fifth Report of the Receiver dated July 6, 2020, the Sixth Report of the Receiver dated August 3, 2020, and the Seventh Report including the Confidential Appendix thereto, and on hearing the submissions of counsel for the Receiver, counsel for the Applicant, counsel for Edson’s and Brause, and counsel for PJN and the Debtors, no one appearing for any other person, although properly served as appears from the Affidavit of Service of • sworn •, 2020, filed herein:

1. THIS COURT ORDERS that the time for service of the Notice of Motion of the

Receiver and the Seventh Report is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL

2. THIS COURT ORDERS that the E/B Settlement Agreement and the Transactions contemplated thereunder (including, without limitation, the mutual settlement of claims, the releases attached as Schedules “D”, “E” and “F” to the E/B Settlement Agreement and the sale of inventory) are hereby approved (other than as to certain actions of NEL and NPL in relation to providing certain real property mortgages as described in the E/B Settlement Agreement, which are the subject of a further Order made in these proceedings), and the completion of the E/B Settlement Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions contemplated by the E/B Settlement Agreement.

3. THIS COURT ORDERS AND DECLARES THAT paragraph 4 of that certain Sale Approval Order made by this Court on April 29, 2020 applies to the purchase by E/B of the Purchased Inventory (as defined in the E/B Settlement Agreement) pursuant to the Settlement Agreement, such that upon the implementation of the Transactions, E/B shall acquire the Purchased Inventory and title to the Purchased Inventory shall vest absolutely in E/B free and clear of any Encumbrances (as such term is defined in the Sale Approval Order).

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 any of the Debtors, and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtors,

the Transactions contemplated by the E/B Settlement Agreement, including without limitation the releases attached as Schedules “D”, “E” and “F” to the E/B Settlement Agreement, approved pursuant to this Order shall be binding on any licensed insolvency trustee of the bankruptcy estate that may be appointed in respect of any of the Debtors and shall not be void or voidable by creditors of the Debtors, nor shall any of the Transactions constitute nor be deemed 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.

SEALING

5. THIS COURT ORDERS that the Confidential Appendix to the Seventh Report shall be sealed, kept confidential and not form part of the public record and shall remain stored electronically with this Court on an encrypted basis limiting access to only the Registrar of this Court and the presiding Judge and shall only be made accessible or form part of the public record upon further Order of this Court.

UNSEALING

6. THIS COURT ORDERS that the Confidential Appendices to the Third Report of the Receiver dated June 22, 2020, which Confidential Appendices were sealed by the Notre Dame Approval and Vesting Order made by this Honourable Court on June 30, 2020, and the Confidential Appendices to the Sixth Report of the Receiver dated August 3, 2020, which Confidential Appendices were sealed by the Niagara Approval and Vesting Order made by this Honourable Court on August 10, 2020, shall no longer be sealed and shall form part of the public record.

SEVENTH REPORT AND ACTIVITIES OF RECEIVER

7. THIS COURT APPROVES the Seventh 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 Seventh Report.

GENERAL

8. 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.