

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, AN 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., 4093879 CANADA LTD., 4093887 CANADA LTD., NYGARD INTERNATIONAL PARTNERSHIP, NYGARD PROPERTIES LTD., and NYGARD ENTERPRISES LTD.

Respondents

AND

Estate Nos: 31-2627758, 31-2627760, 31-2627764, 31-2627767, and 31-458926

IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF NYGARD PROPERTIES LTD., NYGARD ENTERPRISES LTD., NYGARD INTERNATIONAL PARTNERSHIP, 4093879 CANADA LTD., AND 4093887 CANADA LTD.

NOTICE OF MOTION
HEARING: SEPTEMBER 14, 2020 at 9:00 A.M.
BEFORE THE HONOURABLE MR. JUSTICE J. G. EDMOND

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NOTICE OF MOTION

The Respondents will make a Motion before The Honourable Justice J. G. 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 Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

THIS MOTION IS FOR:

1. An Order abridging the time for service of the Notice of motion and dispensing with further service thereof.

2. An Order authorizing the withdrawal of the proposal proceedings commenced by Nygard Enterprises Ltd. (“**NEL**”), Nygard Properties Ltd. (“**NPL**”), 4093879 Canada Ltd. (“**3879**”), 4093387 Canada Ltd. (“**3887**”), and Nygard International Partnership (“**NIP**”, and together with NEL, NPL, 2879, and 3887 are the “**Canadian Borrowers**”) under the *Bankruptcy and Insolvency Act* in Estate Nos. 31-2627758, 31-2627760, 31-2627764, 31-2627767 and 31-458926 (the “**NOI Proceedings**”), without prejudice to the ability of the Canadian Debtors, or any of them, to seek to commence in future fresh proposal proceedings under the BIA.
3. An order that the withdrawal NOI proceeding does not constitute a deemed assignment into bankruptcy.
4. An Order discharging A. Farber & Partners Inc. as Proposal Trustee (the “**Proposal Trustee**”) in the NOI Proceedings without further obligation or liability in respect thereof.
5. An Order directing the Proposal Trustee to deliver the Bankruptcy Retainer (as defined in the affidavit of Greg Fenske sworn September 13, 2020) to Thompson Dorfman Sweatman LLP (“**TDS**”), counsel to the Receiver (as hereinafter defined).
6. An Order confirming that the Shareholders Meetings (as hereinafter defined) were not in violation of the Appointment Order (as hereinafter defined)..
7. Alternatively, an Order that Greg Fenske is authorized to execute the Settlement Agreement, and any ancillary documents as required, on behalf of the Canadian Borrowers.

8. An Order sealing the Confidential Brief until the Closing Date (as that term is defined in the Settlement Agreement).
9. Such further and other relief as this Honorable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. On March 9, 2020, the Canadian Debtors each filed a notice of intention to file a proposal in the NOI Proceedings, and the Proposal Trustee was appointed.
2. On March 18, 2020, the Applicant (in conjunction with its co-lender Second Avenue Capital Partners LLC ("**Second Avenue**" and together with the Applicant are the "**Lenders**"), obtained an Order appointing Richter Advisory Group Inc. as receiver (the "**Receiver**") over the property, assets, and undertaking of the Respondents (the "**Appointment Order**").
3. On March 18, 2020, the Court granted an Order staying the NOI Proceeding (the "**Stay Order**").
4. On June 2, 2020, the Court granted an Order providing a priority charge for rent payments owing to certain of the Respondents' landlords (the "**Landlord Charge Order**").
5. Nygard Inc., was the tenant of certain warehouse premises located in Gardena, California (the "**California Properties**"). The California Properties are owned by E/B and were used by the Respondents as its distribution center in the United States.
6. The Receiver has not paid rent for its continued use of the California Properties and has taken the position that the Landlord Charge Order does not apply to rents

owing. As a result, a motion was brought requiring payment of said rents (the “**Rent Payments Motion**”).

7. The Receiver issued a report dated June 6, 2020, making certain allegations regarding payments made and received by E/B (the “**E/B Payments**”). E/B has denied, and continues to deny the allegations made by the Receiver.
8. On September 8, 2020, the parties concluded negotiations by entering into a settlement agreement (the “**Settlement Agreement**”). The Settlement Agreement will be further described in the Receiver’s next report, but the Settlement Agreement includes:
 - (a) Receivers withdrawal of any allegations regarding the E/B Payments;
 - (b) E/B’s withdrawal of the Rent Payments Motion;
 - (c) formalization of the Receiver/Nygaard Inc.’s date for surrendering the California Properties;
 - (d) resolution of various real property and inventory related matters; and
 - (e) the Canadian Borrowers’ obtaining an Order withdrawing the NOI Proceedings without prejudice of the Canadian Borrowers (together with some, or all, of the remaining Respondents) filing a new NOI at a later date.
9. Prior to the NOI Proceedings, the Canadian Borrowers consulted with the Proposal Trustee, and required a third-party retainer which would be held as security for the Proposal Trustees fees and disbursements (the “**Retainer**”). Edson’s agreed to provide the Retainer.

10. As part of the Retainer Agreement, the Proposal Trustee received a retainer that was to be held as security for its fees and disbursements. The Retainer Agreement split the retainer between the Proposal Trustee's fees in the NOI proceeding and fees and disbursements that may be incurred if the Proposal Trustee was subsequently appointed as a trustee in bankruptcy pursuant to a deemed assignment into bankruptcy.
11. The withdrawal of the NOI Proceedings and discharge of the Proposal Trustee will permit the Proposal Trustee to release some, or all, of the Retainer which will be used to, amongst other things, satisfy certain financial aspects of the Settlement Agreement.
12. The Amending Order limited the scope of the Receiver's appointment as it pertained to NEL and NPL. The Receiver has confirmed that certain real property located in Vaughan, Ontario, and Falcon Lake, Manitoba are not Property as that term is defined in the Appointment Order (the "**Non-Receivership Property**").
13. Pursuant to the terms of the Settlement Agreement, Edson's has agreed to advance, by way of a loan to the Debtors, funds to satisfy certain payments under the Settlement Agreement. As security for the loan, NPL has agreed to grant Edson's a collateral mortgage over the Non-Receivership Property (the "**Collateral Mortgages**").
14. After the Appointment Order, the Directors of NEL and NPL resigned. By shareholder meetings held on September 11, 2020, Greg Fenske was appointed as Director of both NEL and NPL (the "**Shareholder Meetings**"). As Director of

NPL, Greg Fenske executed the Settlement Agreement and agreed to grant the Collateral Mortgages.

15. The Confidential Brief contains documents with sensitive information. It would be prudent to have the Confidential Brief sealed until the Closing Date, as that term is defined in the Settlement Agreement.
16. Such further and other grounds as counsel may advise and this Honorable Court may permit.

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

1. Affidavit of Greg Fenske, sworn September 13, 2020;
2. Receiver's Reports; and
3. Such further and other material as counsel may advise and this Honorable Court may permit.

Date: September 13, 2020

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