

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 -

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.

AFFIDAVIT OF GREG FENSKE

AFFIRMED this 6th day of October, 2020

LEVENE TADMAN GOLUB LAW CORPORATION

Barristers and Solicitors
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WAYNE M. ONCHULENKO

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I, GREG FENSKE, of the City of Winnipeg, in the Province of Manitoba,

AFFIRM:

1. I was the Director of Systems for the Nygard Group of Companies (and I am now a director of the Debtors) and as such have I have 12 years of direct and personal knowledge of the technical facts and matters which are hereinafter deposed to by me except where same are stated to be based on information and belief, and which I believe to be true.

2. In my role as the Director of Systems I was responsible for the integration of the IT with the Finance systems which puts me in an expert position to comment on the statements and proposals presented by the Receiver.
3. The current Nygard systems reflect their origin in the 80's as world class IT systems: as best of breed Nygard IT became the standard of the industry worldwide. I was responsible for designing and implementing the migration to new leading-edge Microsoft AX cloud based Azure solution.
4. I am writing this Affidavit in support of the Respondents' efforts to:
 - a. obtain the financial information they require to allow Albert Gelman Inc. to assess the financial status of the three debtors and two limited guarantee companies;
 - b. to secure the documents required to be preserved by Peter Nygard and the Debtor companies as outlined in subpoenas from the US attorneys and the American civil litigation;
 - c. To amend the Documents and Electronic Files Access Order (DEFA); and
 - d. To stop the sale of the Inkster building.

Financial information required by Albert Gelman Inc. to assess the financial status of the three debtors and two limited guarantee companies and

5. In order to assess the global financial status, and in particular, the intercompany debt of the companies, the Respondents must have access to the financial records of the non-debtor companies as well as the all of the other companies of the Nygard Group that are not covered by the Receivership.
6. Since the last hearing date in this matter, there has been an exchange of emails between counsel for the Respondents and counsel for the Receiver, negotiating the production of financial reports and documents.
7. The Receiver has insisted that the Respondents must complete a Documents and Electronic Files Access Order (DEFA) request before it will begin the work to provide the critical financial reports. It is the Respondents' position that the Receiver could have and should have started this work, and begun to provide the information requested from the AX system, on a daily basis as early as Friday, October 2, 2020.
8. On Thursday October 1, 2020, the Receiver advised that it understood the requests for 8 of the 12 financial reports requested. The Receiver sought clarification on the 4 remaining requests and asked to schedule phone meeting on Friday October 2, 2020 at 11:30 am.
9. The Respondents took from this acknowledgement that the Receiver would immediately direct the Nygard Financial staff working with Richter in the Inkster building to begin producing the 8 reports they did have clear direction on.

10. The Respondents were not able to arrange a meeting with all the requested attendees on such short (14 hour) notice.
11. The Respondents therefore suggested that a meeting take place on the following day - Saturday October 3, 2020 at 3:30pm.
12. On Saturday October 3, 2020 at 11:43 am, the Receiver advised that it could not participate in a meeting over the weekend and advised that it was "looking into whether a call on Monday will work, and will get back to [us].
13. Due to the Receiver's request for clarification of only 4 of 12 requests for financial data from the AX financial system, the Respondents' requests for basic financial reports has been delayed by at least five days.
14. These delays have prevented Albert Gelman Inc. from being able to start their assessment of this matter and the development of an NOI proposal.
15. The requirement for a DEFA request is inappropriate in these circumstances because:
 - a. the DEFA order does not apply to the Debtors.
 - b. The Respondents are not requesting existing files or records be searched. The Respondents are requesting the production of new financial reports from the AX accounting software. The Receiver has acknowledged the experienced Nygard Financial Team are familiar with these reports.

- c. The document delivery time of 15 days (as set out in the DEFA order plus a further potential 5-10 days to develop a protocol) is not appropriate, and will result in a prejudice to the Respondents.
- d. The requirement for the Respondents to use the DEFA process for a purpose it was not designed for will result in an increase in legal and other resource costs as well as needlessly add days to the response times.

Securing of documents required to be preserved by Peter Nygard and the Debtor companies as outlined in subpoenas from the US attorneys and the American civil litigation

- 16. In order to adhere to the requirements of the subpoenas, the Respondents must be provided with supervised access to review *all* documents/emails on the file server. Only with this access can they be assured that they have adhered to their obligations to the courts. The Respondents cannot rely on a 3rd party to ensure their compliance.
- 17. The Receiver served its Notice of Motion on Friday September 25, 2020 at 5:55 pm. This Notice of Motion seeks, among other things, authorization to abandon or destroy the records that remain at the Inkster and Broadway properties.
- 18. Following the service of its Notice of Motion, the Receiver provided its Eighth Report. This Report was provided to the Respondents on Monday September 28, 2020 in contemplation of the hearing date on September 30, 2020.

19. After the service of the Receiver's September 25 Motion and the Receiver's 8th report, counsel for the Respondents and Peter Nygard personally were contacted by US attorneys to confirm that the requirements of the Preservation Orders be adhered to.
20. On September the 29, 2020 the receiver offered to sell the Inkster building to the Respondents without any conditions other than price. Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a true copy of said email.
21. Since the hearing date of September 30, 2020, the Respondents have attempted to work with the Receiver to negotiate a solution to the requirement for financial reporting and the request for records.
22. Given the relief that the Receiver is requesting in its Notice of Motion, the DEFA order (and the timelines set out therein) are not appropriate. The Respondents require immediate access to the financial data as set out in the Respondents' Notice of Motion.
23. On Sunday October 4 The Receiver has advised that it was investigating a different solution to the document preservation order. They were now proposing to create full mirror images of the servers for their requirements and make an identical copy for the Respondents at an estimated cost to the Respondents of USD\$50-70,000.
24. It is the position of the Respondent that the proposal of the Receiver made Sunday October 4 would result in the Respondents having to pay to receive an estimated double the amount of data it actually requires (such as 100+ Terra bytes of fashion images). The use of

physical server-based storage instead of the more flexible, efficient and dependable cloud based technology is a more costly proposal.

25. The Receivers revised proposal on Sunday October 4 contained only reference to a new incomplete plan for retention of the documents.
26. The Respondents are seeking access to the entirety of the records to be able to review and ensure that all necessary documents have been copied for compliance with the Data Preservation requests.
27. It is the Respondents' position that a DEFA request is not appropriate for several reasons:
 - a. The original subpoena pertained to any and all emails pertaining to Peter Nygard. The second subpoena required emails pertaining to Tiina Tullikorpi, Greg Fenske, Angela Dyborn, Marten Dyborn and Lili Micic. The Respondents seek to preserve the documents of all former board members, executive and senior managers; as well as any associates providing direct services to this list. It would be impossible to select individual documents using a key word search. Rather, their entire email records and individual file folders must be kept.
 - b. A copy of the database for the Nygard Travel system must also be retained in order to address issues of dates and locations for individuals required in defense of existing and future litigation.
 - c. The nature of the task as outlined above cannot be conducted based on "Key Words". The Key Word search requires 100% accuracy on the listed subjects, content or names. The results

of Edsons' efforts to use the DEFA process has resulted in the delivery of documents that were not required, and there were many gaps in the records that were required as a key word was missed or misspelled (or, the individual who created the file misspelled when naming the file).

- d. The Respondents have been denied access to their data for over 6 months and as time passes, it is more difficult to recall the Key Words necessary to complete the request. Instead, a supervised review of the files must take place to ensure that no files are missed or overlooked.
- e. In addition to the time required to assemble the lists required for a DEFA Request the document delivery time of 15 (plus a possible 5-10 more days to develop a protocol) days provided by the DEFA order is unacceptable in these circumstances. These documents must be assembled immediately given the Court and the Receivers time frames and the ongoing risk of equipment failure.
- f. It is the Respondents' position that the DEFA was created at the beginning of the Receivership at a time when there were many unknowns and concerns on behalf of the Secured Creditor to be repaid in full. The Secured and Preferred creditors have now been satisfied and the focus of the Receivership has changed.
- g. Having to add additional key words for a new search will create another delay of 15 days each time a request is made.

To amend the DEFA Order.

28. As described above the DEFA Order does not work well with the changed circumstances. It was ordered at a time when the NOI was stayed and it did not look as if the secured creditors would be paid. The circumstances now are the secured creditors will be paid and how will the other assets be dealt with to pay the unsecured creditors.
29. The Respondents recommend a process where the debtors have an opportunity to review the material in a supervised and secure manner and request copies of the material, they require for the purposes of potentially moving forward with the proposal and for the purposes of preservation of documentation.
30. The Receiver has offered the Respondents the opportunity to remove and reinstall the existing servers (containing all the data) at another location and thereby have full access and control of their data. They acknowledge in their email of Sunday October 4 that moving the servers is unlikely to be successful.
31. The Respondents fail to understand why the Receiver is not cooperating, given that the Respondents have agreed to review the documents in a supervised and secure manner (which prevents any alteration to the data).
32. With every passing day, the Receiver's costs are eroding potential equity for unsecured creditors. The sooner the Respondents are in possession of the financial information, the sooner Mr. Gelman and his

company can conduct a proper assessment of the financial affairs of each of the debtor companies and assess the viability of an NOI filing.

To stop the sale of the Inkster building.

33. On September 30th, 2020, the date of our last attendance, the Inkster building was still being offered for sale. There was a conditional offer which had been accepted last May. Over the weekend we were advised the conditions had either been satisfied or waived and that the Inkster building now had an accepted offer which would by the end of this month be brought to the Court for approval.
34. On October 4, 2020, at 11:23 am, the Receiver's counsel advised in an email as follows: "the servers will need to be dismantled and removed from the Inkster building to accommodate a sale of the Inkster building. We can now confirm that the conditional sale of the Inkster building first described in the Second Report of the Receiver dated May 27, 2019, has been finalized. That is, conditions (other than as to Court approval) of the Purchaser have been satisfied or waived. The Purchase Agreement remains conditional on Court approval." Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a true copy of said email.
35. This new decision has created an urgency that did not exist before. This was an urgency that was only contemplated in the Receiver's Motion. Now it is present.
36. This sale was completed while there was a motion before the Court requesting that the Inkster building sale not be completed until such

time as it could be determined if there were sufficient assets to pay off the secured creditors so that the unsecured creditors could participate, by way of a vote, in determining if they wanted the Inkster building sold or if perhaps it could be used to generate income to pay the unsecured creditors in a more fulsome way.

37. If the Inkster building is sold the unsecured creditors will not be able to participate in the decision of how they want to be paid. The decision is not just about protecting the assets but is now making a decision for the unsecured creditors. It is more reasonable to let the unsecured creditors make this decision for themselves. I support the process as set out in the Amended Notice of Motion.

38. I make this affidavit in support of the motion herein.

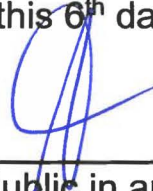
AFFIRMED before me at the)
City of Winnipeg, in the)
Province of Manitoba this 6th)
day of October, 2020)

_____)
A Barrister-at-Law in and for the)
Province of Manitoba.)



GREG FENSKE

This is Exhibit "A" referred to in the
Affidavit of Greg Fenske, affirmed before
me at the City of Winnipeg, Province of
Manitoba, this 6th day of October, 2020

A handwritten signature in blue ink, consisting of a large, stylized 'C' followed by a vertical line and a horizontal stroke.

A Notary Public in and for the Province
of Manitoba

From: Bruce Taylor <GBT@tdslaw.com>

Sent: September 29, 2020 6:14 PM

To: Wayne M. Onchulenko <WOnchulenko@ltglc.ca>; Domenico Magisano <dmagisano@lernalers.ca>

Cc: Ross McFadyen <RAM@tdslaw.com>; Melanie LaBossiere <MML@tdslaw.com>

Subject: Nygard Receivership - Inkster building [LAW-TDS.FID1853952]

Wayne/Dom, as you know, the Receiver has entered into a conditional agreement for the sale of the Inkster building. The Receiver is working on (perhaps imminently) finalizing certain terms of the agreement, but it currently remains conditional.

We had asked earlier that you canvass your clients and let us know if they are interested in purchasing the Inkster building. We have not received responses from you and are following up on that request.

Your clients are, of course, very familiar with the Inkster building. Would you please confirm right away whether or not any of your respective clients are interested in purchasing the Inkster building, and, if so, at what price.

Regards,

G. Bruce Taylor

Partner

P 204-934-2566

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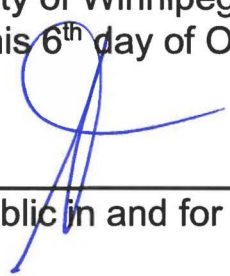


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This is Exhibit "B" referred to in the Affidavit of Greg Fenske, affirmed before me at the City of Winnipeg, Province of Manitoba, this 6th day of October, 2020



A Notary Public in and for the Province of Manitoba

Brittni Van Dasselaar

From: Bruce Taylor <GBT@tdslaw.com>
Sent: October 4, 2020 11:23 AM

To: Wayne M. Onchulenکو <WOnchulenکو@ltglc.ca>

Cc: Domenico Magisano <dmagisano@lerner.ca>; Ross McFadyen <RAM@tdslaw.com>; Melanie LaBossiere <MML@tdslaw.com>

Subject: FW: Nygard Receivership - document matters [LAW-TDS.FID1853952]

Wayne,

1. in response generally to electronic record access/preservation issues:

(a) it remains the understanding of the Receiver that, once the servers located in the Inkster building are dismantled, it is unlikely that they can generally be set up and “plugged in” at another location without loss of functionality, which creates the risk of loss of (or loss of access to) electronic records. The Receiver understands that your clients agree with this analysis.

(b) the servers will need to be dismantled and removed from the Inkster building to accommodate a sale of the Inkster building. We can now confirm that the conditional sale of the Inkster building first described in the Second Report of the Receiver dated May 27, 2019, has been finalized. That is, conditions (other than as to Court approval) of the Purchaser have been satisfied or waived. The Purchase Agreement remains conditional on Court approval. The Receiver is obliged to take steps to seek Court approval, which the Purchase Agreement requires be obtained on or before November 16, 2020. We will now seek a date for the hearing of a motion to approve the sale. Given the indications from Justice Edmond as to his schedule, we do not expect such a motion to be scheduled until late October/early November. If approved, the closing date of the sale is 60 days following Court approval. In the result, subject to Court approval of the Inkster sale, there is a period of approximately 3 months available to address issues regarding the preservation of electronic files prior to the expected dismantling of the servers.

(c) as we described to the Court on September 30 (and as we described to you prior to Sep 30), the Receiver is investigating the opportunity to copy the files saved on the Nygard file servers system. The Receiver is expecting to have more detailed information on this process on Tuesday Oct 6, however, it is the Receiver’s current understanding that (i) in the range of 37 million files would be copied in this process, representing user-generated files currently saved on the system, (ii) that, while it is the intention of the Receiver to have a forensic image of these files made for the Receiver’s purposes (i.e. to preserve a “pristine” copy of these records), a further copy (including documents, records and electronic files currently saved on the system, for the period up to March 17, 2020) can be made, at the Debtors’ cost, to be provided to the Debtors. The present approach would be that this copy for the Debtors/non-Debtors would essentially include all documents, records and electronic files (other than email) that are saved to the Nygard system up to and including March 17, 2020. This presumably would enable access to available relevant documents for litigation production purposes. It is the Receiver’s present understanding that the cost to the Debtors of obtaining such a copy would be in the range of USD50,000-70,000 (including hardware costs) per copy. It is also the Receiver’s understanding that the copy that could be made available to the Debtors (and/or others) (together with the copy of the emails described below) would include copies of “all of the documents”, which is what you are currently asking to review.

(d) in addition, as we described to the Court on September 30 (and as we described to you prior to Sep 30), the Receiver is investigating the opportunity to copy all “@nygard.com” email currently stored in Office 365. The Receiver is expecting to have more detailed information on this process by October 9, 2020, but presently understands that this process will take up to 3 weeks to complete and will include perhaps millions of emails. Again, it is the Receiver’s understanding that a copy of the email data currently on the Nygard system for the period up to and including March 17, 2020 could be made available to the Debtors, at the Debtors’ cost. The Receiver does yet not have estimates of the cost. Again, it is the Receiver’s understanding that this “copy” would enable access to relevant email correspondences, for litigation production purposes.

(e) because of the intermingled manner in which the “Nygard Organization” conducted business and managed its records, the copies of user-generated files/emails would include records that are Debtor records and “non-Debtor records”. “Non-Debtor” records includes what you have referred to as “personal” records. It would be the Receiver’s

understanding that the copies of the user-generated records and email data acquired by the Debtors, would be intended to be accessed, through the Debtors, by Debtors and non-Debtors.

(e) copies of the user-generated records and email data can include only materials that are saved to the system. The Receiver is aware that certain electronic records were deleted from the system (e.g. on March 18, 2020). The Receiver has no way of knowing whether, or to what extent, records relevant to any particular litigation or production obligation may have been deleted from the system prior to the appointment of the Receiver.

(f) As we advised both you and the Court, the Receiver is investigating these processes. Copies have not yet been made, and will not be made until arrangements regarding these matters are confirmed by Court order. Once those matters are addressed, and assuming the Receiver's understandings are confirmed by the further information it expects to receive next week, the Receiver presently estimates that it will take 4-6 weeks for these copies to be created.

2. As to your comments in green below, please see our specific responses, in all capitals, so that they are distinguishable.

Regards,

G. Bruce Taylor
P 204-934-2566
C 204-295-5241