

IN THE COURT OF APPEAL
IN BANKRUPTCY AND INSOLVENCY

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) Respondent,

- 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) Appellants.

NOTICE OF MOTION OF THE RECEIVER
BEFORE A JUDGE IN CHAMBERS
ON THURSDAY, DECEMBER 17th, 2020 at 10:00 a.m.

Thompson Dorfman Sweatman LLP
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(Matter No. 0173004 GBT)
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INTERNATIONAL PARTNERSHIP,

(Respondents) Appellants.

NOTICE OF MOTION OF THE RECEIVER

Richter Advisory Group Inc., in its capacity as court-appointed receiver (the “**Receiver**”) of certain of the assets, undertakings, and properties of the Appellants (the Respondents in the Court below), Nygard Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc.,

Nygaard NY Retail, LLC, Nygaard Enterprises Ltd., Nygaard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd. and Nygaard International Partnership (collectively, the “**Respondents**”), will make a motion before a judge of the Court of Appeal sitting in chambers on Thursday, the 17th day of December, 2020 at 10:00 a.m., or as soon after that time as the motion can be heard at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR:

1. If necessary, an order abridging the time for service of the within motion and the supporting materials;
2. An order cancelling any stay imposed as a result of section 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) with respect to Inkster Approval and Vesting Order;
3. A declaration that, pursuant to section 193 of the BIA, the Respondents require leave of a Judge of this Honourable Court to proceed with the proposed appeal as set out in the Notice of Appeal filed on November 27, 2020, and that the stay imposed pursuant to section 195 of the BIA is inapplicable in respect of the Order of Mr. Justice Edmond of the Court of Queen’s Bench pronounced on the 19th day of November, 2020 (the “**Inkster Approval and Vesting Order**”) until such time as leave may be granted to the Respondents;

4. Further in the alternative, and if necessary, an order providing for the hearing of the appeal of the Respondents on an expedited basis, and the abridgement of applicable time periods and filing deadlines;
5. If necessary, an adjournment of this motion with respect to the relief sought at paragraphs 3 and 4 herein;
6. The costs of this motion; and
7. Such further and other relief as the nature of this case requires and this Honourable Court deems just and appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. Pursuant to the Inkster Approval and Vesting Order, Mr. Justice Edmond of the Court of Queen's Bench, *inter alia*:
 - (a) approved the sale transaction (the "**Transaction**") contemplated by the accepted Offer to Purchase (as amended) (the "**Sale Agreement**") between the Receiver as vendor and Eighth Avenue Acquisitions Ltd. (or such nominee as designated by Eighth Avenue Acquisitions Ltd.) as purchaser (the "**Purchaser**") relating to assets described in the Sale Agreement, namely the land and premises (including, without limitation, buildings and fixtures) located at 1771 Inkster Boulevard in Winnipeg, Manitoba, and certain

chattels used in connection with that property (collectively, the “**Inkster Property**”), as entered into by the Receiver pursuant to its powers under that certain Order made by Mr. Justice Edmond on the 18th day of March, 2020 (the “**Receivership Order**”) following a sale process;

- (b) provided for the vesting in the Purchaser of all the right, title and interest of the Respondent Nygard Properties Ltd. (“**NPL**”) and the Receiver in and to the Inkster Property, free and clear of all claims, charges and encumbrances upon the closing of the Transaction;
- (c) dismissed the Respondents’ request for an order discharging the Receiver, and refused the Respondents’ request for a lifting of the stay under the Receivership Order for the purpose of allowing one or more of the Respondents to file a Notice of Intention to Make a Proposal pursuant to the BIA; and
- (d) granted certain other related relief.

2. While the Respondents filed a Notice of Appeal with this Honourable Court on November 27, 2020, pursuant to section 193 of the BIA the Respondents require leave from a Judge of this Honourable Court in order to proceed with their proposed appeal from the Inkster Approval and Vesting Order;

3. In the event it is determined that the Respondents are permitted to proceed with the appeal set out in the Notice of Appeal without obtaining leave, section 195 of the BIA provides that the filing of the Notice of Appeal by the Respondents imposes an automatic stay on all further proceedings under the Inkster Approval and Vesting Order, including the closing of the Transaction and the vesting of title to the Inkster Property in the name of the Purchaser;
4. Pursuant to the Sale Agreement, the Transaction is scheduled to close by January 18, 2021, and the Transaction may not proceed if not closed in accordance with the Sale Agreement;
5. The decision of Mr. Justice Edmond was an exercise of judicial discretion and is therefore entitled to deference;
6. The Respondents' appeal (or proposed appeal, as the case may be) lacks merit;
7. The effect of a stay of the Inkster Approval and Vesting Order in the present case is to jeopardize the closing of Transaction, the loss of which will likely cause substantial loss and harm to the Receiver and other interested stakeholders;
8. There will be significant uncertainty if the Transaction does not close, with no guarantee that the Purchaser will be willing to proceed with the Transaction on the terms agreed, or at all, at any future date;

9. There is no irreparable harm to NPL, or to any of the other Respondents, in permitting the Transaction to proceed and close as scheduled as the net proceeds from the sale of the Inkster Property shall stand in the place and stead of the Inkster Property pursuant to paragraph 5 of the Inkster Approval and Vesting Order;

10. In the circumstances, the balance of convenience lies with cancelling the stay and allowing the Transaction to close as currently scheduled;

11. If the Respondents are permitted to proceed with their appeal (or proposed appeal, as the case may be), and whether or not the stay of the Inkster Approval and Vesting Order pursuant to section 195 of the BIA is lifted, the Receiver submits that it is appropriate to proceed with the appeal on an expedited basis, with the abridgment of timelines for the filing of materials, to promptly determine issues raised by the appeal, including as to the discharge of the Receiver;

12. The Receivership Order;

13. Sections 193 and 195 of the BIA;

14. Rules 31 and 32 of the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368, as amended;

15. Sections 7 and 36 of *The Court of Appeal Act*, C.C.S.M. c. C240;
16. Rules 42, 43.1, 43.2 and 43.3 of the *Court of Appeal Rules*, M.R. 555/88, as amended; and
17. Such further and other grounds as 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 relevant portions of the record from the Court of Queen's Bench in File No. CI 20-01-26627 relating to the Inkster Approval and Vesting Order which are included with the Affidavit of Adam Sherman, sworn December 10, 2020 and filed herein:
2. Such further and other documentary evidence as the lawyers for the Receiver may advise and as this Honourable Court may permit.

December 11, 2020

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