

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 -

NYGÅRD 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

NOTICE OF MOTION
DATE OF HEARING: MARCH 10, 2020 AT 2:00 P.M.
BEFORE THE HONOURABLE MR. JUSTICE J.G. EDMOND

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(File No. 7856/370)

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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

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NOTICE OF MOTION

The Applicant, White Oak Commercial Finance, LLC ("**White Oak**"), will make a Motion before the Honourable Mr. Justice Edmond on Tuesday, March 10, 2020 at 2:00 p.m. or as soon after that time as the Motion can be heard at the Law Courts Complex 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR:

1. An Order for short leave for the hearing of this Motion and an Order validating and/or dispensing with service of the within Motion;
2. If necessary, an Order terminating the thirty day period for making a proposal under Section 50.4(11) of *The Bankruptcy and Insolvency Act* R.S.C. 1985 c.B-3 ("*BIA*");

3. If necessary, an Order lifting the stay of proceedings under Section 69(1) of the *BIA* to allow White Oak to proceed with its Application for appointment of a Receiver herein;
4. Costs of the within Motion;
5. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. Court of Queen's Bench Rules 1.04, 2.03, 3.02, 14.05, 16.04 and 16.08;
2. *Bankruptcy and Insolvency Act* Sections 2, 50.4, 69 and 244;
3. *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 rule 5;
4. On February 26, 2020 White Oak delivered to the respondents a demand for repayment of outstanding Indebtedness in the amount of US \$25,870,783.37, and served a Notice of Intention to enforce security pursuant to Section 244 of the *BIA*;
5. Following the expiry of the ten-day notice period under Section 244 of the *BIA*, on March 9, 2020, at 7:55 p.m. CST, White Oak submitted a Notice of Application for filing in the Manitoba Court of Queen's Bench herein for, *inter alia*, the appointment of a Receiver over the property of the respondents;
6. On March 9, 2020, 4093879 Canada Ltd., 4093887 Canada Ltd., Nygard Properties Ltd., and Nygard Enterprises Ltd., and Nygard International Partnership (the "**NOI Respondents**") filed a Notice of Intention to make a Proposal ("**NOI**") under the *BIA* in Ontario;
7. Pursuant to Section 69(2)(b) of the *BIA*, the stay provided under Section 69(1) does not apply to prevent a secured creditor who gave Notice of Intention to Enforce Security against

the Insolvent person more than ten days before the Notice of Intention under Section 50.4 was filed, unless the secured creditor consents to the stay;

8. White Oak is therefore not subject to the stay arising from the filing of the NOI Respondents' NOI, as the NOI Respondents filed the NOI more than ten days after White Oak delivered its Notice of Intention to Enforce Security;
9. In the alternative, pursuant to Section 50.4(11) the Court may, on application by a creditor, terminate before its actual expiration, the thirty day stay period under the NOI provided that it is satisfied that:
 - (a) the Insolvent person has not acted or is not acting in good faith and with due diligence;
 - (b) the Insolvent person will not likely be able to make a viable proposal before the expiration of the period in question;
 - (c) the Insolvent person will not likely be able to make a proposal before the expiration of the period in question, that will be accepted by the creditors, or
 - (d) the creditors as a whole would be materially prejudiced by the stay under the NOI;
10. Pursuant to Section 69.4 of the *BIA*, the Court may, on application by a creditor declare that the stay no longer operates in respect to that creditor or person if it is satisfied that:
 - (a) the creditor is likely to be materially prejudiced by the continued operation of the stay;
 - (b) it is equitable on other grounds to make such a declaration.

11. White Oak says that the NOI Respondents are not acting in good faith in filing the NOI; that no proposal will likely be made that will be acceptable to White Oak; that White Oak and all other creditors will be unduly prejudiced by the stay of proceedings; and that it is fair and just in all of the circumstances that the Court lift the stay, and terminate the thirty day stay provision under the NOI;
12. The NOI must be filed in the locality of the debtor pursuant to section 2 and section 50.4(1) of the *BIA*;
13. White Oak relies on the inherent jurisdiction of this Honourable Court;
14. Such further and other grounds as counsel may advise and this Honourable Court may allow.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. Affidavit of Robert L. Dean, affirmed March 9, 2020;
2. Such further and other evidence as counsel may advise and this Honourable Court may permit.

March 10, 2020

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File No. 7856/370

TO: **Attached Service List**

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Respondents.

SERVICE LIST AS OF MARCH 10, 2020

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(as at March 10, 2020)

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