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

Respondents

SUPPLEMENTAL SUBMISSION OF THE APPLICANT

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(File No. 7856/370)

The Nygård Group's Notice of Intention ("NOI") is Procedurally Improper

1. The Nygård Group filed their NOI in Ontario on Monday March 9, 2020. The Lenders submit that the NOI was filed in the wrong jurisdiction and that it should have been filed in Winnipeg. It is therefore improper.

2. Under subsection 50.4 (1) of the *Bankruptcy and Insolvency Act* ("BIA"), reproduced below, the debtor is required to file the NOI with the official receiver in the debtor's "locality":

> Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating
>
> (a) the insolvent person's intention to make a proposal, … .
> (emphasis added)

3. The term "locality" is not defined in the BIA. As the Lenders submitted in their Brief on this Application, the term "locality of the debtor" is a defined term. For ease of reference, section 2 of the BIA provides that:

> locality of a debtor means the principal place
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> **(a)** where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
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> **(b)** where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
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> **(c)** in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

4. For the reasons set out in the Lenders' Brief, the above test requires the Court to consider which jurisdiction has the most substantial connections to the debtor's business (i.e. the "principal place"). Applying this test, the "locality" of the Nygård Group is Winnipeg, not Ontario, as it is the "nerve centre" of the Respondents' business.

5. The Respondents' connections to Ontario are negligible. There is no basis in fact for claiming that Ontario is the principal place where the Nygård Group carries on business or where the debtor "resides". It must therefore be inferred that the Respondents' decision to file their NOI in Ontario, knowing that the Lenders were bringing this Application in Winnipeg based on the proper jurisdiction test under the BIA, is purely tactical, designed to buy time and create delay and confusion.

The NOI Was Filed Twelve Days After the Section 244 Notice

6. The Lenders sent their subsection 244(1) Demand and Notice of Intention to Enforce (the "Section 244 Notice") on February 26, 2020. Under subsection 244(2), they were then required to refrain from enforcing their security until a period of ten days had expired (the "Standstill Period"). Under the rules for counting the Standstill Period and for determining the day on which it expired, the first day of the period was February 27, 2020. The last day (Day 10) was March 7, 2020, a Saturday.

7. The intent of the BIA is clear from the wording of subsection 244(2). Under that provision, the secured creditor is required to refrain from enforcing its security for a full ten day period following the sending of the Section 244 Notice. However, the secured creditor is immediately entitled to enforce on the eleventh day. In this case, the eleventh day was Sunday March 8.

8. Subsection 69(1) of the BIA imposes a stay of proceedings upon the "filing" of an NOI. However, subsection 69(2) of the BIA provides that the stay of proceedings under subsection (1) does not apply (*inter alia*):

> To prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent

> person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay. (emphasis added).

9. Subsection 244(1) and subsection 69(2) are intended to work together. They refer to the same ten day period. In other words, the debtor must file the NOI within the ten day period while the secured creditor is precluded from enforcing in order to ensure that the stay of proceedings will apply to preclude the secured creditor from enforcing its security.

> *John Deere Credit Inc. v. Doyle Salewski Lemieux Inc.*, 1997 CarswellOnt 4431 (CA) at para. 9.

10. The Lenders submit that the Respondents filed their NOI twelve days after the Section 244(Notice was sent. As a result, even if the NOI had been properly filed in the correct jurisdiction, the stay of proceedings under subsection 69(1) of the BIA cannot apply to preclude the Lenders from enforcing their security.

11. The Lenders may be relying upon the older decision of the Ontario Court of Appeal in *John Deere* for the proposition that they were entitled to file their NOI on Monday March 9 because the ten-day Standstill Period expired on a Saturday. However, that case is no longer applicable for this point. It was decided at a time when it was not possible for an insolvent debtor to file an NOI electronically on a day when the court office is not open. In order to alleviate the unfairness created by this situation, the Ontario Court of Appeal therefore relied on former Rule 112 of the BIA Rules, together with section 26 of the federal *Interpretation Act*, to deem the debtor to have filed the NOI within the ten day Standstill Period if the debtor filed on the Monday immediately following the Sunday when the Standstill Period expired.

12. At the time that *John Deere* was decided, Rule 112 provided that:

> where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices of the court are closed, and by reason thereof the act or proceeding cannot be done or taken on that day,

> the act or proceeding shall, for the purpose of determining the time when the act was done or the proceeding taken, be deemed to be done or taken on the next day on which such offices are open.

13. Rule 112 has since been repealed. Since it is now possible to file an NOI electronically on a Saturday, there is no need for such a rule. There was nothing standing in the way of the ability of the Respondents to file their NOI on Saturday, before the Standstill Period expired. The Respondents should have filed their NOI no later than the end of the day on Saturday, March 7 in order to stay the enforcement of the Lenders' security.

14. Nor does section 26 of the federal *Interpretation Act* have any application here. As the Court of Appeal held in *John Deere* at para. 11:

> Where the ten-day period available to the insolvent person to file and thereby gain the protection of a stay expires on a Sunday, it is my view that the insolvent person may file a notice of intention to make a proposal on Monday, the next day, so as to trigger the stay.. (emphasis added)

However, in our case, the Standstill Period created by the Section 244(1) Notice expired on a Saturday, not a Sunday. Under the *Interpretation Act*, a "holiday" includes a Sunday, but not a Saturday. In any event, since the ten-day period expired on Saturday and the Respondents could have filed their NOI within that period, the *Interpretation Act* should be irrelevant.

> (*Interpretation Act*, s. 35(1), "holiday")

15. Without the "deeming" effect of Rule 112 (now repealed) and given that the *Interpretation Act* does not assist here, it is plain that the Respondents must point to some other provision in the Rules that allows them to file the NOI late and still have the stay of proceedings under subsection 69(1) apply to the Lenders. They cannot. There is no equivalent in the Rules to former Rule 112. Rule 4 only applies where the relevant period under the BIA is shorter than six days. Rule 5 establishes certain deeming rules for "receipt" of a notice or document. However,

the time period for the purposes of subsection 69(2) is counted from the date of "filing" of the NOI, not receipt.

16. For these reasons, the Respondents filed their NOI late, and the stay of proceedings does not apply to preclude the Lenders from enforcing their security, including by bringing the Application for the appointment of the Proposed Receiver.

In Any Event the Stay Should be Terminated or Lifted

17. In the alternative, the Lenders submit that the stay of proceedings should be terminated or lifted to allow the application for the appointment of the Proposed Receiver to proceed.

18. Pursuant to Section 50.4(11) of the BIA:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
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> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
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> (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
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> (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
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> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
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> and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

19. The Lenders submit that the disjunctive test for terminating the 30 day stay period is easily met. There is ample evidence filed in support of this Application that demonstrating the Respondents have not acted in good faith during the period leading up to the filing of their NOIs.

Moreover, the filing itself is a purely tactical, defensive move, designed to postpone the inevitable to the cost and material prejudice of the Lenders.

20. Even if this Court determines that the Respondents should be relieved from the consequences of filing their NOIs late and in the wrong jurisdiction, it is therefore submitted that the Court should terminate the automatic stay. There is no proposal that could be acceptable to the Lenders. Nor are the Lenders prepared to consent to any further diminution to the value of their Collateral represented by the funding arrangements that the Respondents will inevitably need to put in place in order to remain in business for the time required to develop a proposal.

21. There are numerous examples in the case law of circumstances in which the Court has refused to entertain similar tactical manoeuvres. These cases arise as a result of an insolvent debtor's last-ditch attempts to stave off the inevitable by seeking to remain in control through a debtor-in-possession proceeding under either the Proposal provisions of the BIA (Part III) or the *Companies' Creditors Arrangement Act* (CCAA).

22. Thus, for example, in one case in which the debtor sought to file an NOI in the face of the enforcement steps taken by a principal secured creditor, the Court determined that the stay period should be terminated based on a number of a factors. These included certain misrepresentations by the debtor, the fact that the principal secured creditor objected and the fact that the principal secured creditor had lost confidence in the debtor and its management.

Alberta 1252206 Alberta Ltd. v. Bank of Montreal, 2009 ABQB 355

23. In *Affinity Credit Union*, the debtor sought to bring an application for a CCAA stay of proceedings as a defensive tactic against a proposed receivership. The Court in that case refused to grant the CCAA order, on the basis that the debtor had not acted in good faith, including by

failing to comply with contractual requirements to provide financial information. Moreover, the debtor had no real plan to restructure its affairs. The secured creditor would therefore essentially have to bear the costs of the debtor-in-possession proceeding, given that its security would be further diminished by imposing a priority DIP charge ahead of it.

> *Affinity Credit Union 2013 v. Vortex Drilling Ltd.* 2017 SKQB 228 at paras. 34, 35 and 37

24. The Respondents have not come forward with any concrete restructuring plan that could be acceptable to the Lenders. Instead, they have continually failed to provide relevant financial information, failed to acknowledge the erosion to the Lenders' Collateral, and made empty promises of future sale transactions or repayment. None of the promised transactions, nor the promised repayment (which was to have occurred by end of day on Monday March 9) have materialized. This Court should therefore exercise its discretion to terminate the stay of proceedings and allow the Application to appoint the Proposed Receiver.

25. Finally, in the further alternative, this Court should declare that the stay of proceedings does not apply to the Lenders under section 69.4 of the BIA. Even if this Court declines to grant the relief under section 50.4(11) and the thirty-day stay period is allowed to remain in relation to the Respondents' stakeholders as a whole, the Lenders submit that the stay should be lifted to allow the Lenders to enforce their security, including allowing this Application to proceed to appoint the Proposed Receiver. Under section 69.4 of the BIA:

> A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
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> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration..

26. The Lenders have provided ample evidence to this Court in this Application of the material prejudice they are experiencing due to the erosion to their Collateral. There can be no assurance that the diminishing value of that Collateral that forms part of the borrowing base will be sufficient to fully repay the Lenders, as the Lenders' evidence states. And this conclusion applies without any inevitable requests by the Respondents for funding during the stay period, together with any "priming" security they may seek in such regard.