

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 -

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 7 day of September, 2021

LEVENE TADMAN GOLUB LAW CORPORATION

Barristers and Solicitors
700 - 330 St. Mary Avenue
Winnipeg, Manitoba
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WAYNE M. ONCHUENKO

QB Box no. 105
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File No. 113885/WMO

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AFFIDAVIT OF GREG FENSKE

I, **GREG FENSKE**, of the City of Winnipeg, in the Province of Manitoba, AFFIRM:

1. I am a director of each of the Respondents and as such have personal knowledge of the facts to which I hereinafter depose.
2. On June 4, 2021, the Receiver brought a motion in this proceeding, which motion is returnable November 5, 2021 (the "**Receiver's Motion**"). A true copy of the Receiver's

notice of motion is attached hereto as **Exhibit "A"**.

3. In support of its motion, the Receiver filed the Twelfth Report of the Receiver dated June 4, 2021 (the "**Twelfth Report**"), which consists of 79 pages exclusive of appendices, and 683 pages inclusive of appendices. A true copy of the Twelfth Report, without appendices, is attached hereto as **Exhibit "B"**.

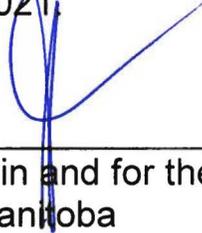
4. The Respondents oppose the Receiver's motion.

5. On July 16, 2021, Wayne Onchelenko, counsel for the Respondents, sent a list of questions for the Receiver respecting its Twelfth Report, (the "**Questions**"), to counsel for the Receiver, Bruce Taylor, ("**Taylor**"). A true copy of Onchelenko's email to Taylor, with its attachment, is attached hereto as **Exhibit "C"**. Onchelenko wrote a follow-up email to Taylor on July 28, 2021, a true copy of which is attached as **Exhibit "D"**.

6. On July 30, 2021, Taylor wrote Onchelenko to advise that the Receiver would not answer any of the Questions. A true copy of Taylor's email to Onchelenko is attached hereto as **Exhibit "E"**.

7. On August 4, 2021, counsel for the Respondents, Fred Tayar ("**Tayar**"), wrote a long, detailed letter to Taylor in which he alerted Taylor to the guiding jurisprudence and asked Taylor whether the Receiver would reconsider its refusal to answer any questions. A true copy of Tayar's letter is attached hereto as **Exhibit "F"**.

This is **Exhibit "A"** referred to in the
Affidavit of Greg Fenske
Affirmed before me at the City
of Winnipeg, in the Province of
Manitoba, through the use of
Videoconferencing, as permitted
by Order under The Emergency
Measures Act, this 7th day of
September, 2021.



Notary Public in and for the
Province of Manitoba

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CANADA LTD., 4093887 CANADA LTD., and NYGARD
INTERNATIONAL PARTNERSHIP,

Respondents.

NOTICE OF MOTION
HEARING: THURSDAY, SEPTEMBER 16, 2021 AT 2:00 p.m.
BEFORE THE HONOURABLE MR. JUSTICE J. G. EDMOND

LEVENE TADMAN GOLUB LAW CORPORATION

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700 - 330 St. Mary Avenue
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INTERNATIONAL PARTNERSHIP,

Respondents.

NOTICE OF MOTION

The Respondents will make a Motion before the Honourable Justice J. G. Edmond on Thursday, September 16, 2021, at 2:00 p.m., or as soon after that time as the motion can be heard, at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

PROPOSED METHOD OF HEARING: This motion is to be heard orally.

THE MOTION IS FOR:

1. An order that Adam Sherman ("**Sherman**") or Eric Finley ("**Finley**") of

Richter Advisory Group Inc., in its capacity as receiver of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard International Partnership, Nygard Properties Ltd., 4093879 Canada Ltd. and 4093887 Canada Ltd. (the “**Receiver**”), attend for a cross-examination on the Twelfth Report of the Receiver dated June 4, 2021 (the “**Twelfth Report**”), on a date to be agreed upon, or failing that on a date to be set by the Court;

2. In the alternative, an order directing that the Receiver answer the questions arising out of the Twelfth Report, attached hereto as **Schedule “A”** in writing, within 15 days, as well as all follow-up questions, within 15 days of the Receiver’s receipt of those questions;

3. Costs of the motion on a substantial indemnity basis; and

4. Such further and other relief as this Honorable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. On June 4, 2021, the Receiver brought a motion in this proceeding, which motion is returnable November 5, 2021 (the “**Receiver’s Motion**”). The plea for relief in the notice of motion extends past four pages, but the primary relief sought is as follows.

(b) [An order] [d]eclaring that:

*(i) each of the Debtors [the Respondents] are jointly liable for the debts and liabilities (the “**Common Liabilities**”) of each of the other Debtors, and the Debtors are joint debtors with respect to the Common Liabilities;*

(ii) *the assets (the “**Common Assets**”) of each of the Debtors shall be treated as “common assets” subject to the Common Liabilities; and*

(iii) *each of the Debtors is an insolvent person as defined in the BIA;*

(c) *[An order] [d]eclaring that, accordingly, the assets and liabilities of the Debtors are properly to be substantively consolidated for purposes of addressing the claims of creditors of each of the Debtors;*

(d) *[An order] [a]uthorizing the Receiver to:*

(i) *make assignments (“**Bankruptcy Assignments**”) in bankruptcy in the locality of Winnipeg, Manitoba in respect of the property of each of the Debtors for the general benefit of each of the Debtor’s creditors, including in relation to the Common Liabilities;*

2. If the order sought by the Receiver is granted, the result for the Respondent Nygard Properties Ltd. (“**NPL**”) will be that it will be assigned into bankruptcy not because it is insolvent but because other Respondents, the relevant debts of which NPL has not guaranteed, are insolvent. NPL’s assets will then be liquidated and the proceeds paid to the unsecured creditors of other Respondents. NPL will, therefore, strenuously oppose the motion.

3. In support of its motion, the Receiver filed the Twelfth Report, which consists of 79 pages exclusive of appendices, and 683 pages inclusive of appendices.

4. In the view of the Respondents, the Twelfth Report contains a number of assertions and assumptions which require clarification, expansion, or challenge.

5. The law is that Court-appointed receivers are obliged to answer questions concerning their reports. The practice is that those questions are to be provided in writing,

or to be asked orally in the context of an interview, which may be recorded. In this case, the Respondents sent a list of questions for the Receiver respecting its Twelfth Report, (the “**Questions**”), which list is attached hereto as **Schedule “A”**, on July 16, 2021.

6. On July 30, 2021, counsel for the Receiver, Bruce Taylor, (“**Taylor**”), advised that the Receiver would not answer any of the Questions.

7. On August 4, 2021, counsel for the Respondents, Fred Tayar (“**Tayar**”), wrote a long, detailed letter to Taylor in which he alerted Taylor to the guiding jurisprudence and asked Taylor whether the Receiver would reconsider its refusal to answer any questions.

8. On August 11, 2021, Taylor replied to iterate the Receiver’s refusal to answer any of the Questions.

9. Again, receivers are obliged to answer questions concerning their reports. If, as here, a receiver refuses to answer any questions concerning its Report, the Court can take the uncommon step of ordering the Receiver to be cross-examined under oath.

10. The Receiver has brought a motion that, if granted, will have substantial negative consequences for the Respondents. It is, by its refusal to answer any questions concerning its Twelfth Report, attempting to have its evidence on that motion placed before the Court without challenge. The position the Receiver has taken is improper and contrary to the law of receiverships. It should therefore be required to produce one of the two representatives who signed the Twelfth Report for cross-examination on that Report or, in the alternative, to answer the Questions put to it, and all follow-up questions, within 15 days.

11. The moving party is a stakeholder in this proceeding, to which the Receiver owes a fiduciary duty. Rather than observe that duty, the Receiver is seeking to avoid performance of a basic obligation to the stakeholders, being to answer questions concerning a report to the Court. Its blunt refusal to answer any questions is in clear defiance of the jurisprudence, and has necessitated this motion.

12. 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. the Affidavit of Greg Fenske, to be filed;
2. the Notice of Motion of the Receiver (Net Receivership Proceeds Order);
3. the Twelfth Report of the Receiver dated June 4, 2021; and
4. such further and other grounds as counsel may advise and this Honourable Court permit.

Date: September 7, 2021

**LEVENE TADMAN GOLUB LAW
CORPORATION**

Barristers and Solicitors
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WAYNE M. ONCHULENKO
Phone: (204) 957-6402
Fax: (204) 957-1696

Questions for Receiver Respecting Its Twelfth Report

With respect to the chart at paragraph 104, called “Separate Corporation Analysis”:

1.
 - i) under the heading “payroll”, please explain how the \$8.1 million figure was calculated for NIP;
 - ii) why was \$980,000 in payroll allocated to the US entities?
 - iii) why was \$4.647 million in overhead allocated to corporate overheads?
2. A rent payment of \$6.175 million is allocated to NIP and nil to NPL, yet there is an allocation of the Landlord Charge of \$1.293 million to NPL, precisely equal to the amount allocated to NIP. Please explain why NPL is responsible for any of the Landlord Charge, given that it did not pay, and was not obliged to pay, rent as would a tenant?
3. Among the professional fees of \$6.438 million, there is an allocation based on gross proceeds of sale to each of NIP and NPL. Yet the amount of work associated with the sale of NPL’s assets or dealing with NPL would be marginal: payment of hydro and realty taxes and the time spent by the Receiver hiring the brokers and deciding on realty offers and counteroffers in conjunction with the brokers. Please identify from the Receiver’s dockets and those of its counsel which dockets are allocated to (a) NPL and (b) NIP.
4. Of the substantial amount of data and computer hardware that is held by the Receiver, how much is the property or data of NPL?
5. An allocation of \$4.155 million is made for corporate overhead allocation to NPL. That includes a percentage allocation of payroll, rent, postage and courier, bank fees, consultant fees, sales tax and Landlord Charge, all of which should be allocated to the operating business, not to the realty corporation. Do you agree? If not, explain the basis supporting \$4.155 million in corporate overhead allocation for NPL.
6. The borrowings by the Receiver totaled \$30.082 million. How much, if any, of those borrowings were utilized for the benefit of NPL, rather than for the operating entities?
7. In light of the borrowings necessary for the operating business, how does or would the Receiver propose to book the payments to White Oak:
 - i) in the books of the US entities;
 - ii) in the books of NIP; and
 - iii) in the books of NPL?
8. What tax loss was created in NPL when NPL paid White Oak under its guarantee? Explain your answer and please document your assumptions.

9. What impact would a consolidation order have on NPL's tax loss, referred to in the previous question?
10. Provide a sub-schedule that lists separately the fees of the Receiver, TDS and Katten.
11. Provide a sub-schedule that lists separately the fees of KLDISCOVERY Inc., in relation to their preparation of the "forensic copy" and for any other consulting work that they have been paid for. Where are their fees reported/grouped in the Receipts and Disbursements statements?
12. Provide a sub-schedule of borrowing interest and fee payments on the Credit Facility that also ties into/reconciles to the Receiver's Borrowings and Distribution to Lenders set out in the Receipts and Disbursements statement.
13. With respect to the \$1,296,202 invoice related to the Falcon Lake Property and referenced at paragraph 156(e) of the 12th Report and attached as Appendix I:
 - i) has the Receiver examined the lease between NPL and NIP to see whether the tenant was responsible to pay for the leasehold improvements? If so, what is the answer?
 - ii) is this invoice accounted for in the intercompany accounts between NIP and NPL?
 - iii) does the Receiver agree that the contract started in 2016 (per the 1st revision reference) and that, as at Jan 27, 2018, \$1,097,339; 84% of the total, had already been invoiced by the contractor?
 - iv) since Ernst & Young provided its audit opinion on the January 31, 2018 financial statements, would the Receiver agree that those financial statements can be relied upon for the purpose of being satisfied that at least \$1,097,339 of the total \$1,296,202 invoice would have been properly accounted for through the intercompany account between NIP and NPL?
14. Provide a list of consultants who have been engaged and paid in relation to the ransomware attack and set out how much was paid to each consultant. Where are their fees reported/grouped in the Receipts and Disbursements statements?
15. Were outside consultants or Richters' IT Group engaged to implement the Cloud Based Solution? If so, how much was paid and where are their fees reported/grouped in the Receipts and Disbursements statements.
16. Provide a summary of any work performed by Richters' IT group. Are their fees set out in the Receiver's accounts? If not, provide the amount paid for fees and show where their fees are reported/grouped in the Receipts and Disbursements statements.

17. Has the source or original entry point of the ransomware attack been determined? If so, please provide details in relation to this. If not, has any attempt been made by Richter or outside consultants to determine the source or original entry point?
18. Has the Receiver considered or established if any consultant may be liable for damages in relation to the ransomware attack, and has the Receiver considered commencing an action against such consultant(s)?
19. Has the Ransomware attack affected the Receiver's ability to provide accurate and detailed Receipts and Disbursements statements?
20. Does the Receiver have a listing of creditors, including names and amounts, by Debtor? If so, please provide that listing.

Notices Issued by Receiver

21. Please provide copies of the notices sent by the Receiver pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, including a list of the addressees.
22. With respect to para. 1 of the Receiver's Report, the Receiver has defined "Property" as including all of the assets of NPL. Please confirm that the Receivership property does not include the Falcon Lake and Fieldstone properties.

Further Questions Regarding Receiver's Twelfth Report

23. With regard to para. 46 (b), with which (a) landlords and (b) suppliers did the Receiver assist? Which members of the Nygard Group was the Receiver assisting?
24. With respect to para. 46 (d), which former employees did the Receiver retain? Produce the independent contractor agreements.
25. With respect to para. 46 (h), which (a) payroll remittances and (b) for which Debtor companies did CRA conduct an audit? Produce the reports of CRA in that regard.
26. With respect to para. 46 (i), in respect of which Debtors was the Department of Finance making a claim? Produce the documentary evidence of such claims.
27. With respect to para. 46 (j), what "conduct" was investigated, and what is the result of such investigation?
28. With respect to para. 46(s), which vehicles were "purportedly transferred"? What is meant by "purportedly"?
29. With respect to para. 48, how did the attacker enter the password-protected servers? Please provide details of (i) damage; (ii) missing data; and (iii) explain what is meant by "functionality ... has been permanently compromised and will not operate in the same fashion". Produce reports received from the Receiver's consultant(s).

30. With respect to para. 52, what “significant challenges [are] faced by the Receiver”?
31. With respect to para. 53, were T4’s issued after the ransomware attack? If yes, produce. Were corporate tax returns filed? If yes, produce them.
32. With respect to para. 69, how does the Receiver have an interest in the proceeds of the disposition of the Falcon Lake and Fieldstone properties “to maximize unsecured creditor recoveries”? Does the Receiver owe a fiduciary duty to NPL? To NEL? To Peter Nygard?
33. With respect to para. 71, what are the “relevant issues”?
34. With respect to para. 75 (a) (iii), what “creditor purposes”? Which creditors?
35. Does the Receiver anticipate income tax recoveries on the basis of losses that have been sustained by some of the Debtors? If yes, which Debtors and what income tax recoveries are anticipated?
36. With respect to para. 86, which dispositions of property are expected to generate net proceeds of \$9.9 million? Please breakdown the proceeds by property.
37. With respect to para. 87, which findings did the Court make which are relevant to the analysis?
38. What makes the analysis on a separate corporation basis complex as stated in para. 89? Has the Receiver failed to maintain records that causes complications to the analysis? Has the Receiver made an analysis? Why not? Detail the analysis for each of subparagraphs (a) – (e).
39. With respect to para. 91 (a) – (d),
 - i) how “meaningful” would the equity in NPL be in each outcome?
 - ii) has the Receiver computed the subrogated claim which NIP has? Ditto re NPL? Please show the Receiver’s calculations.
 - iii) how is it fair to NPL’s creditors, including for example CRA, to consolidate NPL’s assets with NIP’s? On what basis is it reasonable to consolidate? Why is reasonableness relevant to the issue of consolidation?
 - iv) why should Debtors assign into bankruptcy? If there is no consolidation, should NPL assign into bankruptcy? Why?
40. With respect to para. 94 (a), please share the advice which the Receiver received from TDS, including support for such advice.
 - i) with respect to 94 (a)(iii), please advise whether charging receivership expenses associated with liquidating the US Borrowers’ inventory to NPL is fair and equitable, and whether doing so readjusts the priority an NPL

creditor has to NPL assets (by using such NPL assets to pay non-NPL liabilities)?

- ii) how did the Receiver calculate Corporate Overhead payroll of \$4.647 million? Please provide back-up schedule therefor.
41. With respect to para. 94 (b), please elaborate on what “a more rigorous process of allocating expenses” consists of?
 42. With respect to para. 94 (d), explain why corporate payroll is not allocable to a particular Debtor. Did the Receiver neglect to keep track of payroll liability of each Debtor? Ditto re professional fees? On what basis is the Receiver’s allocation “reasonable”?
 43. With respect to para. 96, please explain why the posting of security by NPL to secure the Landlord’s Charge would render NPL liable for the Landlord’s Charge.
 44. With respect to para. 97, please elaborate on the Receiver’s allocation. Explain how the allocation to a particular Debtor “would not yield a different outcome”.
 45. For the purpose of argument of the pending motion, please undertake the “review” to be done on a “separate corporation basis”.
 46. With respect to para. 102, how does the existence of joint and several guarantors (NPI with an unlimited guarantee and NPL with a limited guarantee) lead to the allocation of a 50-50 split between the two guarantors?
 47. How does the Receiver book the receipt of the White Oak loan advance(s) in the books of (a) NI and (b) NIP? Also, how does the Receiver’s re-payment to White Oak reflected in (a) the books of NIP and (b) the books of NEL? Why has the Receiver not shown the Excess of Receipts over Disbursements of NIP in line 5 as being also a collection of the accounts receivable due to NI (Inc.) in line 1?
 48. With respect to Note 4 on p.37 (§104), what is the aggregate of the claims of NIP unsecured creditors? What is the aggregate of the claims of NPL unsecured creditors?
 49. It is noted that in preparing all twelve of the Receiver’s reports, the Receiver states that it relied on information it derived from the Debtors’ financial records and statements. Has the Receiver found that any such information unreasonable or not internally consistent? If so, please state the information so found, and detail the unreasonableness or inconsistency. Does the Receiver dispute any of the contents of the most recent audited financial statements of Ernst & Young? Does it dispute inter-company balances therein? Please update such balances from the date of the last audited financials until the date of the receivership.
 50. With respect to paras. 109-110, the Receiver’s accounting treatment differed from the Debtors because the Court held that the borrowers under the loan agreement were NI, not NIP. The Court relied on the express wording in the loan agreement, notwithstanding that the advances from White Oak went directly to NIP. Correct?

51. With respect to para. 110, was the accounting treatment respecting the sales of Notre Dame and Niagara made by independent contractors of the Receiver under whose supervision they worked, and by whom they were paid? Did the Receiver correct the accounting treatment?
52. With respect to para. 112, does the Receiver accept the inter-company balances reflected there in support of its motion? If not, what does the Receiver say the inter-company balances really are?
53. Are paras. 113-123 argument that the Receiver intended to advance in its brief rather than in its report.
54. The Receiver has waived solicitor-client privilege in para. 119. Please produce the advice received from TDS.
55. With respect to para. 120, does a limited guarantor and an unlimited guarantor owe equal obligations to contribute?
56. With respect to para. 122, on what basis is the Receiver's equal allocation to NIP and NPL "fair" in light of NIP having received the benefit of the White Oak advances?
57. With respect to para. 124, why were Fenske's compensation and the Debtors' professional fees allocated by the Receiver to NPL alone?
58. With respect to para. 125, where has NPL argued that it has no third-party creditors? Was CRA a creditor at the date of Receivership, or did it become a creditor as a result of the post-receivership liquidation? What does Receiver estimate that NPL's payment under its guarantee will generate for it as a tax loss? Is such loss reflected in the para. 128 chart?
59. With respect to Note 1 on p. 45, please particularize what NPL expenses were paid by NIP and quantify them.
60. With respect to para. 129, what other obligations "may" NPL have? Details of quantum. Basis for Receiver's "understanding" of NIP employees working for NIP? Was that reflected in the NIP-NPL inter-company transactions that were booked?
61. With respect to the Consolidation Analysis on p. 46, on what basis is the Receiver entitled to seek a consolidation order for several US and Canadian corporations?
62. What return on the dollar would CRA receive as a creditor of NPL in (a) on a non-consolidated basis; and (b) on a consolidated basis?
63. What return on the dollar would creditors of NI received in (a) on a non-consolidated basis; and (b) on a consolidated basis?
64. What return on the dollar would creditors of NIP received on (a) on a non-consolidated basis; and (b) on a consolidated basis?

65. What legal advice (oral and written) did the Receiver receive and which is referenced in para. 133?
66. What legal advice (oral and written) did the Receiver receive and which is referenced in para. 133 (d)?
67. With respect to para. 147, which operations of (a) NPL; and (b) NEL, were financed by “a single credit facility”?
68. With respect to para. 155, what is meant by “on an inconsistent basis?” Please particularize such transactions. What is meant by “non-commercial terms”? Please document those transactions.
69. With respect to para. 156 (c), which specific terms are not “typical of commercial leases”? Were the NPL – leases to NIP at rental rates that were below what was, at the date of the leases, fair market value?
70. With respect to para. 156 (d), did NIP benefit from certain activities and expenditures incurred by NPL?
71. With respect to para. 156 (e), did the lease terms oblige NIP to pay for improvements to the Falcon Lake property? Did NIP’s staff benefit from such improvements? Were the improvements reflected in the inter-company accounting?
72. With respect to para. 157, is the “nerve centre” for Royal Bank of Canada’s business, Royal Bank Plaza in Toronto? If not, where is it?
73. With respect to para. 159, do some of the businesses operated by Royal Bank of Canada’s entities run using common letterhead, advertisements and marketing materials?
74. With respect to Amazon (worldwide), does it commonly present as an integrated corporate enterprise that until recently was managed by Jeff Bezos?
75. With respect to para. 162, were any expenses incurred or paid by NIP for the benefit of our related entities not captured by inter-company expense transactions? If yes, provide particulars of such transactions.
76. With respect to para. 164, would such employees with a claim against NPL and NIP jointly and severally be prejudiced by a consolidation order (since these employees claims against NPL would be reduced significantly by having to share in NPL’s assets with the creditors of NIP and NI)?
77. With respect to para. 174, details of which individuals so advised the Receiver and what precisely each said. Produce supporting documentation.
78. With respect to para. 175, which material transactions were not booked, or were inaccurate?

79. With respect to para. 176, why does the Receiver need to justify the benefits NIP received to make leasehold improvements several years ago? Does the Receiver know the value of the business generated by NIP's access to and use of the Falcon Lake property?
80. With respect to para. 177, has the Receiver taken any steps to set aside or challenge the transactions referred to therein? Also, has the Receiver determined the benefit which NPL and its creditors and shareholder received, if any, from NPL's guarantee of the Credit Facility the proceeds of which went to NIP?
81. With respect to para. 182, did this "view" of the Receiver preclude Ernst & Young from preparing audited financial statements?
82. With respect to para. 186, what financial benefit did NPL receive from NIP? How is that calculated? Does the Receiver intend to claim against NPL on behalf of NIP? Same questions regarding NEL.
83. With respect to paras. 186-187, does the Receiver know whether NPL could have leased out its properties to arm's length lessees at rates that are higher than NIP's contractual arrangements?
84. With respect to para. 189, does the Receiver agree that NIP's return to creditors on a consolidated basis is 6.5¢ on the dollar compared to 6.4¢ on the dollar on an unconsolidated basis?
- Also, NPL's return to creditors on a consolidated basis is 6.5¢ on the dollar, compared to 100¢ on the dollar on a non-consolidated basis.
85. With respect to para. 191, the Original NOI Proceedings contemplated an NOI for each entity, correct? There was no consolidation sought, correct? No motion was brought to consolidate, correct?
86. With respect to para. 194, is this exercise unfair to NIP, or to some other entity? If to some other entity, how is it unfair? Could NPL have retained a property manager rather than NIP's centralized services? If yes, do you agree that NPL could have carried on business on a stand-alone basis? Ditto for NEL?
87. What duty has the Receiver extended to NPL and its creditors in applying for a consolidation order?
88. With respect to para. 195, (a) whose assets were commingled? (b) did NIP or any other entity guarantee the obligations of NPL to arm's length creditors? and (c) particularize the transfer of assets without "substantive observance of formalities" including:
- i) which assets;
 - ii) date of transfer;
 - iii) names of transferor and transferee; and

iv) consideration for the transfer.

89. With respect to para. 197 (a), are there any “other direct liabilities of NPL which the Receiver knows about”? If not, isn’t that a possibility regarding any corporation in receivership?
90. With respect to para. 197 (b), does the Receiver compare 6% to 14% by ignoring the return to each corporation on the p.65 chart which will receive payment of related party liabilities if there is no consolidation (and therefore those proceeds would be distributed to such related parties’ creditors)? For greater clarity, would a 6% return of related party liability to NIP be in effect a 6% return on \$33 million of such debt?
91. With respect to para. 199, does the Receiver believe that in a non-receivership scenario, the creditors of NIP and NI would be able to pierce the corporate veil of NPL?
92. With respect to para. 201, is the basis for which a Court may permit a bankruptcy assignment by a Receiver to reverse statutory tax priorities and/or to exercise rights of examination under s.163(1) of the BIA? If not, what facts would lead a court to authorize the Receiver to assign?

Questions arising from the Receiver’s Brief:

11(a) the connection between employees of NIP and each of the Debtors in order to account for any benefit, direct or indirect, derived by each of the Debtors (in particular, NIP and NPL) to ensure the fair allocation of employee costs and obligations;

45: Has the Receiver not been approving and paying the wages for all employees throughout the receivership? If that is the case, can the Receiver explain why it would not already know the breakdown of liability for employees of NIP and NPL/NEL? On the basis that it must already know this, explain how this point is relevant to NPL and NEL?

34(b) the presence of intercorporate loans being made back and forth between related companies without the observance of typical corporate formalities;

46: what further corporate formalities does the Receiver believe should have been followed, beyond accounting for such loans and booking them in the intercompany accounts, as was done, and reporting such intercorporate loans in the audited financial statements and the notes to the audited financial statements as was done?

42 (d) all creditors of each of the Debtors were tracked and managed centrally on one consolidated accounts payable sub-ledger, regardless of which Debtor procured or benefited from the goods or services obtained;

47: Is the Receiver aware of any creditors of NPL or NEL that are not accounted for in NPL's and NEL's accounting records and separately disclosed on their respective trial balances? Please detail the creditors' names and claims.

42(e) NIP incurred and directly paid all, or substantially all, expenses on behalf of the Debtors, regardless of which Debtor procured or benefited from the goods or services obtained, which expenses were captured for accounting purposes (on an inconsistent basis) as intercompany transactions on non-commercial terms;

48: What evidence does the Receiver have that this was done on an inconsistent basis or on non-commercial terms? If such evidence is included in the Receiver's 12th report or any other report, please refer to the relevant pages/paragraphs/exhibits. Provide documented examples of such transactions and state whether such transactions with NIP were made with NPL or NEL.

42(g)(i) approximately \$8,000,000.00 for the development and maintenance of the NPL Falcon Lake Property, including approximately \$2,600,000.00 in labour expenses directly attributable to the NPL Falcon Lake Property;

49: Has the Receiver investigated whether the development and maintenance costs were accounted for in the Intercompany accounts and if so, what was the result of that investigation?

42(g)(ii) approximately \$5,600,000.00 in capital improvements and maintenance costs for the Inkster Property;

50: Does the property lease between NIP and NPL provide that the tenant (NIP) is to maintain and repair the property, including paying for leasehold improvements?

42(j) NIP funded the overwhelming majority of employee costs notwithstanding that employees provided services and performed functions for, or which benefited, other Debtors;

51: Which other Debtors? The US Borrowers? Does the Receiver have evidence that such employee costs were for NPL's benefit but not allocated to NPL and NEL through the intercompany accounts? If not, then other than accounting services, what other employee services provided by NIP were for NPL or NEL? The General Ledgers of NPL provided to AGI for 2019 and 2020 indicate total accounting transactions of 800 to 1,600 for each year. Does the Receiver agree that the cost to NIP to account for and post those transactions would be negligible? If not, will the Receiver provide an estimate of what a reasonable cost attributable to NPL would be? Alternatively, does the Receiver agree that a standard property management fee for an outside property manager is in the range of 5% of gross

rental receipts? If so, does the Receiver agree that any amount NIP would fairly allocate NPL for providing the property management services should not exceed 5% of gross revenues or roughly \$50,000?

The General Ledgers of NEL provided to AGI indicate total accounting transactions are in the range of 200 to 500 per year. Does the Receiver agree that the cost to NIP to account for and post those transactions would be negligible? If not, will the Receiver provide an estimate of what a reasonable cost attributable to NEL would be?

42(K) the records of the Debtors are commingled within the IT System;

52: Which Debtors records are commingled? What does the Receiver mean by “commingled”? How is the method by which the records are accounted for within the IT system different from the usual practices of any multi-division or multi-corporate enterprise? How were financial statements and tax returns for NPL prepared year-after-year if the records were commingled?

42 (n) it appears that without the centralized services provided by NIP, none of the other Debtors could have carried on business on a stand-alone basis;

53: What centralized services provided by NIP would have prevented NPL from operating on a stand-alone basis?

42(o) the Canadian Debtors took a consolidated approach in relation to the Original NOI Proceedings

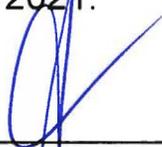
54: Explain in what manner you consider it was a consolidated approach, beyond that for notification purposes to creditors, all creditors were set out on one listing as opposed to separately listed by Debtor. How many NPL creditors were notified? Identify NPL’s creditors.

42(p) throughout the Receivership Proceedings, the Debtors’ own evidence has consistently presented the Debtors and the Business in a manner which “assumes” a common enterprise (e.g. consistently referring to asset of NPL and NIP as “Nygard Group assets” or “Nygard Group Resources”

55: Is the Receiver aware that the Audited Financial Statements are titled “Nygard Group of Companies” and that a description of the operations of the “Nygard Group of Companies” is set out in Note 1 to those financial statements, which note specifically excludes NPL and NEL? In light of that, will the Receiver withdraw that allegation from its brief?

56: Richter Advisory Group Inc. has acted as Receiver for real estate development companies. Would Richter advise whether real estate developers commonly use single-purpose companies for each development? If so, please confirm that accounting/bookkeeping is commonly done at the developer's office for all companies in the group. Please confirm that this common feature of real estate developers does not lead to consolidation of the assets and liabilities of all of the companies in the group. Please also confirm that consolidation in those circumstances may lead to statutory breaches of trust by allowing trades of development A to benefit from the assets of development B.

This is **Exhibit "B"** referred to in the Affidavit of Greg Fenske Affirmed before me at the City of Winnipeg, in the Province of Manitoba, through the use of Videoconferencing, as permitted by Order under The Emergency Measures Act, this 7th day of September, 2021.



Notary Public in and for the Province of Manitoba

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

**IN THE MATTER OF THE RECEIVERSHIP OF
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**

**RICHTER ADVISORY GROUP INC.
TWELFTH REPORT OF THE RECEIVER**

June 4, 2021

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**THE QUEENS BENCH
WINNIPEG CENTRE**

**IN THE MATTER OF THE RECEIVERSHIP OF
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**

**RICHTER ADVISORY GROUP INC.
TWELFTH REPORT OF THE RECEIVER**

June 4, 2021

I. INTRODUCTION

1. On March 18, 2020 (the "**Appointment Date**"), pursuant to an order (the "**Receivership Order**") of the Court of Queen's Bench (Winnipeg Centre) (the "**Manitoba Court**") made in Court File No. CI 20-01-26627 (the "**Canadian Proceedings**"), Richter Advisory Group Inc. ("**Richter**") was appointed as receiver (in such capacity, the "**Receiver**") of the assets, undertakings and properties (the "**Property**") of Nygård Holdings (USA) Limited ("**NHU**"), Nygard Inc. ("**NI**"), Fashion Ventures, Inc. ("**FV**"), Nygard NY Retail, LLC ("**NYC**", and collectively with NHU, NI, and FV, the "**US Debtors**"), Nygard Enterprises Ltd. ("**NEL**"), Nygard International Partnership ("**NIP**"), Nygard Properties Ltd. ("**NPL**"), 4093879 Canada Ltd. ("**879**"), and 4093887 Canada Ltd. ("**887**" and, collectively with NEL, NIP, NPL and 879, the "**Canadian Debtors**") (the US Debtors and the Canadian Debtors together, the "**Nygaard Group**" or the "**Debtors**") to exercise the powers and duties set out in the Receivership Order, pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "**BIA**") and section 55 of *The Court of Queen's Bench Act*, C.C.S.M. c.C280.
2. The Receivership Order was granted pursuant to an application made by White Oak Commercial Finance, LLC, (the "**Agent**") as administrative agent and collateral agent for and on behalf of White Oak and Second Avenue Capital Partners, LLC (collectively, the "**Lenders**") pursuant to security held by the Lenders in the Property of the Debtors provided in connection with a certain loan transaction and a revolving credit facility (the "**Credit Facility**") provided thereunder.
3. The Credit Facility was provided to the Debtors pursuant to a Credit Agreement dated December 30, 2019 (the "**Credit Agreement**" and together with other associated documents, the "**Lenders' Security**") as defined in, and attached as Exhibit "D" to, the Affidavit of Robert Dean affirmed March 9, 2020 (the "**Dean Affidavit**") and filed in these proceedings.
4. Also on March 18, 2020, the Receiver, as the duly appointed foreign representative (the "**Foreign Representative**") of the Debtors, commenced proceedings in the United States Bankruptcy Court for the Southern District of New York (the "**US Court**") by filing, among other things, petitions on behalf of the Receiver in relation to the Debtors pursuant to sections 1504 and 1515 of the US Bankruptcy Code seeking recognition by the US Court of the Canadian proceedings as a foreign main proceeding (the "**Chapter 15 Proceedings**"). On March 26, 2020, the US Court entered, among other things, a provisional recognition order and, on April 23, 2020, the US Court granted a final order recognizing, among other things, the Canadian Proceedings as the foreign main proceeding. The Canadian Proceedings and the Chapter 15 Proceedings are together hereinafter referred to as the "**Receivership Proceedings**".

5. On April 29, 2020, the Manitoba Court made various Orders, including an Order (the “**Sale Approval Order**”) which, among other things, approved an agreement (the “**Consulting and Marketing Services Agreement**”) between the Receiver and a contractual joint venture comprised of Merchant Retail Solutions, ULC, Hilco Merchant Resources, LLC, Hilco IP Services, LLP dba Hilco Streambank, and Hilco Receivables, LLC (collectively, “**Hilco**” or the “**Consultant**”), and White Oak Commercial Finance, LLC, pursuant to which the Consultant provided certain consulting, marketing and related asset disposition services. In addition, as it appeared that a going concern or “en-bloc” sale of the Nygard Group’s assets was not likely, the Sale Approval Order authorized the Receiver to liquidate the Nygard Group’s retail inventory and owned furniture, fixtures and equipment through temporarily re-opened stores (the “**Liquidation Sale**”), as soon as circumstances permitted. As certain details regarding the Liquidation Sale of particular importance to landlords of the Nygard Group’s retail stores (the “**Landlords**”) were not capable of being known with any precision or certainty at that time (given Covid-19 restrictions on non-essential business activities), the Sale Approval Order set out a process that required the Receiver to obtain a further order of the Manitoba Court addressing certain specified matters prior to commencement of the Liquidation Sale.
6. On April 29, 2020, the Manitoba Court made two (2) further Orders: (i) an Order (the “**General Order**”) addressing, among other things, various general matters, including certain amendments to the Receivership Order (limiting the scope of the Receivership Order in relation to the property, assets and undertakings of NEL and NPL) and the procedure for landlord access to properties leased to Nygard Inc. by certain non-Debtor members of the Nygard Organization (as hereinafter defined), and (ii) an Order (the “**DEFA Order**”) establishing the protocol for requesting access to and/or production of documents and electronic files purported to be in the possession or control (or subject to the possession or control) of the Receiver by certain non-Debtor members of the Nygard Organization or directors, officers and employees of the Nygard Group.
7. On May 15, 2020, Edson’s Investments Inc. (“**Edson’s**”) and Brause Investments Inc. (“**Brause**” and collectively, the “**Gardena Landlords**”) filed a notice of motion (the “**Gardena Motion**”) with the Manitoba Court for an order requiring the Receiver to, among other things, lift the stay of proceedings granted by the Manitoba Court in these proceedings so that the Gardena Landlords could terminate leases for properties located in Gardena, California at 312 and 332 East Rosecrans Avenue (“**East Rosecrans**”), 14401 South San Pedro Street (“**14401**”), and 14421 South San Pedro Street (“**14421**” and together with East Rosecrans and 14401, the “**California Properties**”) for failure of the Receiver to pay occupancy rent and retake possession of the California Properties. The Gardena Motion did not proceed as a result of the E/B Settlement Agreement (as hereinafter defined), which was dealt with in the Receiver’s Seventh Report dated September 10, 2020.

8. On June 2, 2020, as required by the Sale Approval Order and in anticipation of commencing the Liquidation Sale where permitted to do so (taking into consideration local public health orders and related Covid-19 restrictions), the Manitoba Court made an Order (the “**Landlord Terms Order**”) addressing certain Landlord matters in relation to the conduct of the Liquidation Sale. Among other things, the Landlord Terms Order granted a charge (the “**Landlords’ Charge**”) over the Property (as defined in the Receivership Order, as amended), in favour of the Landlords to secure the payment of monies for any unpaid rent as described in the Landlord Terms Order for the period commencing March 18, 2020 up to and including the repudiation date of a lease (the “**Unpaid Rent**”).
9. On June 30, 2020, the Manitoba Court made an Order (the “**Notre Dame Approval and Vesting Order**”) approving, among other things, the sale of certain NPL real property located at 1300, 1302 and 1340 Notre Dame Avenue and 1440 Clifton Street (the “**Notre Dame Property**”) in Winnipeg, Manitoba.
10. On June 30, 2020, the Manitoba Court also made an Order (the “**Dillard’s Settlement Approval Order**”) approving, among other things, the terms of an agreed Settlement Agreement and Release of Claims between the Receiver and Dillard's Inc.
11. On August 10, 2020, the Manitoba Court made an Order (the “**Niagara Approval and Vesting Order**”) approving, among other things, the sale of certain NPL real property located at 1 Niagara Street in Toronto, Ontario (the “**Toronto Property**”).
12. On September 15, 2020, the Manitoba Court made an Order (the “**E/B Settlement Approval Order**”) approving, among other things, the terms of a settlement agreement (the “**E/B Settlement Agreement**”) between the Receiver, the Gardena Landlords, the Lenders, NPL, and Peter Nygard and other members of the Nygard Organization. The E/B Settlement Approval Order was recognized by the US Court on November 5, 2020.
13. On October 21, 2020, the Manitoba Court made an Order (the “**Document Abandonment Order**”) approving, among other things, the abandonment of certain documents and property located in the California Properties and the Nygard Group retail stores.
14. On November 19, 2020, the Manitoba Court pronounced an Order (the “**Inkster Approval and Vesting Order**”) approving, among other things, the sale of certain NPL real property located at 1771 Inkster Blvd, Winnipeg Manitoba (the “**Inkster Property**”) and authorizing the Receiver to make such arrangements as it considered reasonable and appropriate for the preservation of over 5,000 boxes of physical documents (the “**Physical Records**”), and the data (the “**Electronic Records**”) and programs (the “**Programs**”) stored or

accessible on the Nygard Group's central information technology system (the “**IT System**”, and together with the Physical Records, Electronic Records and Programs, the “**Records**”).

15. On November 27, 2020, the Nygard Group appealed certain of the relief granted pursuant to the Inkster Approval and Vesting Order, including the authorization of the sale of the Inkster Property (the “**Inkster Appeal**”).
16. On December 8, 2020, the Manitoba Court provided additional direction (the “**December 8 Manitoba Court Direction**”) and clarification of the Order pronounced on November 19, 2020 in respect of the preservation of Records as well as the provision of certain Electronic Records to the Debtors and/or Mr. Nygard. The Receiver considers that the direction of the Manitoba Court as to those matters is properly described within the Inkster Approval and Vesting Order.
17. On December 11, 2020, the Receiver filed materials in support of a motion (the “**December 17 Motion**”) returnable December 17, 2020 seeking an Order of a Judge of the Manitoba Court of Appeal in Chambers, *inter alia*:
 - (a) cancelling any automatic stay imposed as a result of section 195 of the BIA with respect to Inkster Approval and Vesting Order;
 - (b) declaring that, pursuant to section 193 of the BIA, the Debtors require leave of a Judge of the Manitoba Court of Appeal to proceed with the proposed appeal as set out in the Notice of Appeal by the Debtors filed on November 27, 2020, and that the stay imposed pursuant to section 195 of the BIA is inapplicable in respect of the Inkster Approval and Vesting Order until such time as leave may be granted to the Debtors; and
 - (c) in the alternative, and if necessary, an order providing for the hearing of the Inkster Appeal on an expedited basis, and the abridgement of applicable time periods and filing deadlines.
18. In an effort to make efficient use of the limited time available at the hearing of the December 17 Motion, the Receiver deferred the hearing of the relief described in subparagraphs 17(b) and (c) above, and proceeded on December 17, 2020 with the hearing of only its motion for an Order cancelling any stay imposed by the BIA.

19. On December 31, 2020, the Manitoba Court of Appeal made an Order (the “**Lift Stay Order**”) cancelling any stay imposed as a result of section 195 of the BIA with respect to the Inkster Approval and Vesting Order.
20. Subsequent to the pronouncement of the Lift Stay Order, on January 8, 2021, the Debtors discontinued the Inkster Appeal, which the Receiver agreed to accept on a without costs basis. As a result, the Receiver is no longer pursuing any of the further relief sought in the December 17 Motion.
21. On January 28, 2021, the Manitoba Court pronounced an Order (the “**Broadway Approval and Vesting Order**”) approving, among other things, the sale of certain NPL real property located at 702 and 708 Broadway Avenue in Winnipeg, Manitoba (the “**Broadway Property**”).
22. On March 3, 2021, the Manitoba Court pronounced an Order (the “**Landlords’ Charge Claims Procedure Order**”) detailing the process (the “**Landlords’ Charge Claims Process**”) to quantify and resolve the claims of Landlords for any Unpaid Rent in respect of the lease for each retail store (collectively, the “**Leases**”) secured by the Landlords’ Charge.
23. In accordance with the Receivership Order, the Receiver has established a website (the “**Receiver’s Website**”) for the purposes of these proceedings at <https://www.richter.ca/insolvencycase/nygard-group>.
24. Copies of the pleadings and other materials filed in the Receivership Proceedings, other than affidavits and appendices sealed by Order of the Manitoba Court, and the various Orders made by the Manitoba Court are posted to and available for review at the Receiver’s Website.
25. Copies of the pleadings and other materials filed in the Chapter 15 Proceedings, and the various Orders made by the US Court are also posted to and available for review at the Receiver’s Website.
26. The Receiver has engaged Thompson Dorfman Sweatman LLP (Winnipeg) (“**TDS**”) as its Canadian counsel, and Katten Muchin Rosenman LLP (New York) (“**Katten**”) as its U.S. counsel.

II. PURPOSE OF REPORT

27. The Receiver filed its first report dated April 20, 2020 (the “**First Report**”) and its supplementary first report dated April 27, 2020 (the “**Supplementary First Report**”) in support of the Receiver’s motion returnable April 29, 2020. Copies of the First Report and the Supplementary First Report are available on the Receiver’s Website.

28. The Receiver filed its second report dated May 27, 2020 (the “**Second Report**”) and its supplementary second report dated May 31, 2020 (the “**Supplementary Second Report**”) in support of the Receiver's motion returnable June 1, 2020 seeking, among other things, the Landlord Terms Order. Copies of the Second Report and the Supplementary Second Report are available on the Receiver's Website.
29. The Receiver filed its third report dated June 22, 2020 (the “**Third Report**”) and its supplementary third report dated June 29, 2020 (the “**Supplementary Third Report**”) in support of the Receiver's motion returnable June 25, 2020 seeking, among other things, the Notre Dame Approval and Vesting Order. Copies of the Third Report and the Supplementary Third Report are available on the Receiver's Website.
30. The Receiver filed its fourth report dated June 27, 2020 (the “**Fourth Report**”) in support of the Receiver's motion returnable June 30, 2020 seeking, among other things, the Dillard's Settlement Approval Order. A copy of the Fourth Report is available on the Receiver's Website.
31. The Receiver filed its fifth report dated July 6, 2020 (the “**Fifth Report**”) in response to the Gardena Landlords' motion returnable August 10, 2020. A copy of the Fifth Report is available on the Receiver's Website.
32. The Receiver filed its sixth report dated August 3, 2020 (the “**Sixth Report**”) in support of the Receiver's motion returnable August 10, 2020 seeking, among other things, the Niagara Approval and Vesting Order. A copy of the Sixth Report is available on the Receiver's Website.
33. The Receiver filed its seventh report dated September 10, 2020 (the “**Seventh Report**”) and its supplementary seventh report dated September 14, 2020 (the “**Supplementary Seventh Report**”) in support of the Receiver's motion returnable September 14, 2020 seeking, among other things, the E/B Settlement Approval Order. Copies of the Seventh Report and the Supplementary Seventh Report are available on the Receiver's Website.
34. The Receiver filed its eighth report dated September 28, 2020 (the “**Eighth Report**”) and its supplementary eighth report dated October 12, 2020 (the “**Supplementary Eighth Report**”) in support of the Receiver's motion (the “**Document Transfer Motion**”) returnable September 30, 2020, and later adjourned to October 14, 2020 and then October 21, 2020, seeking, among other thing, the Document Abandonment Order. In addition to the Document Abandonment Order, the Receiver's motion also sought Orders from the Manitoba Court:
 - (a) directing and authorizing the transfer, if so requested by the Debtors, of the Redundant Records (as defined in the Eighth Report) located at the Inkster Property and the Broadway Property to the party or parties (the “**Transferee**”) to be identified by counsel for the Debtors; and

- (b) authorizing and empowering the Receiver to abandon, destroy or otherwise dispose of the Redundant Records in the event that the Transferee does not remove same from the Inkster Property and the Broadway Property within a prescribed time period.
35. The Receiver subsequently withdrew its motion in relation to the relief described in subparagraphs 34 (a) and (b) above and included within the Ninth Reports (as hereinafter defined) and the Tenth Report (as hereinafter defined) updates in relation to the preservation of the Records.
36. The Receiver further notes that certain matters which were included in the Document Transfer Motion, including, among other things, the approval of the actions/activities of the Receiver, the interim statements of receipts and disbursements and the interim accounts of the Receiver and its counsel (which were challenged by the Debtors) were adjourned until further Order of the Manitoba Court. The actions/activities of the Receiver and the interim statements of receipts and disbursements were subsequently approved by the Manitoba Court as part of the Inkster Approval and Vesting Order. On December 10, 2020 the Debtors also advised that they were withdrawing their challenge of the interim accounts of the Receiver and its counsel. A copy of the Eighth Report and the Supplementary Eighth Report are available on the Receiver's Website.
37. The Receiver filed its ninth report dated November 2, 2020 (the "**Ninth Report**"), its supplementary ninth report dated November 10, 2020 (the "**Supplementary Ninth Report**"), and its second supplementary ninth report dated December 30, 2020 (the "**Second Supplementary Ninth Report**", and together with the Ninth Report, the Supplementary Ninth Report and the Second Supplementary Ninth Report, the "**Ninth Reports**") in support of a motion (the "**Inkster Approval Motion**") returnable November 9, 2020, and later November 13, 2020 seeking, among other things, the Inkster Approval and Vesting Order. A copy of the Ninth Report, the Supplementary Ninth Report and the Second Supplementary Ninth Report are available on the Receiver's website.
38. The Receiver filed its tenth report dated January 21, 2021 (the "**Tenth Report**") in support of a motion (the "**Broadway Approval Motion**") returnable January 28, 2021 seeking, among other things, the Broadway Approval and Vesting Order. A copy of the Tenth Report is available on the Receiver's website.
39. The Receiver filed its eleventh report dated February 24, 2021 (the "**Eleventh Report**") in support of a motion (the "**Landlords' Charge Claims Procedure Motion**") returnable March 3, 2021 seeking, among other things, the Landlords' Charge Claims Procedure Order. A copy of the Eleventh Report is available on the Receiver's website.

40. The purposes of this report, the Receiver's twelfth report (the "**Twelfth Report**"), are to provide information and/or guidance to the Manitoba Court in respect of the following:
- (a) the actions and activities of the Receiver since the Eleventh Report;
 - (b) the status of the Receiver's efforts to preserve Records and the impact of a ransomware attack (the "**Ransomware Attack**") which, as previously reported by the Receiver, has compromised certain Electronic Records, Programs and the IT System of the Nygard Group (used commonly by other parties in addition to the Nygard Group (collectively, the "**Nygarde Organization**"));
 - (c) the status of the Landlords' Charge Claims Process;
 - (d) the sale or proposed sale of certain NPL real property not included as Property pursuant to the Receivership Order (as amended), including the Receiver's efforts to reach a voluntary agreement (the "**NPL Proceeds Preservation Agreement**") with NPL as to the preservation of certain of the proceeds of any such sales pending the Manitoba Court's final determination of certain matters, including (i) the state of the intercompany accounts among NPL, NEL and NIP, (ii) the claim previously advanced by NPL to be subrogated to the security held by the Applicant as against the Property of the Debtors, including the extent/amount of such subrogation, and (iii) the consolidation of the Debtors for creditor purposes;
 - (e) the Receiver's interim statement of receipts and disbursements for the period from the Appointment Date to May 15, 2021 (the "**May 15 Interim R&D**");
 - (f) the Receiver's views on the appropriate treatment of the funds realized from the Property in excess of the Lenders' guaranteed secured claim, after taking into consideration priority claims and the costs of the Receivership Proceedings, as well as any further funds available by means of the NPL Proceeds Preservation Agreement;
 - (g) the consolidation of the Debtors for creditor purposes; and
 - (h) the fees and disbursements of the Receiver and its counsel.

41. A further purpose of this Twelfth Report is to provide the Manitoba Court with an evidentiary basis to make an Order:
- (a) approving this Twelfth Report and the actions/activities of the Receiver described herein;
 - (b) approving the NPL Proceeds Preservation Agreement;
 - (c) approving the May 15 Interim R&D;
 - (d) declaring that each of the Debtors is jointly liable for the debts and liabilities (the “**Common Liabilities**”) of each of the other Debtors, and the Debtors are joint debtors in respect to Common Liabilities;
 - (e) declaring that the assets (the “**Common Assets**”) of each of the Debtors shall be treated as “common assets” subject to the Common Liabilities;
 - (f) declaring that the assets and liabilities of the Debtors be substantively consolidated for creditor purposes and for the administration and payment of creditor claims of each of the Debtors;
 - (g) authorizing the Receiver to file assignments in bankruptcy on behalf of each of the Debtors on a basis that reflects the Common Assets and the Common Liabilities, or, in the alternative:
 - (i) authorizing the Receiver to file assignments in bankruptcy on behalf of the Debtors other than NPL and NEL, in the manner described in subparagraph (g) above; and
 - (ii) authorizing the Receiver to file in the Manitoba Court applications for bankruptcy orders in relation to NPL and NEL, on a basis that reflects the Common Assets and the Common Liabilities and the substantive consolidation of the estates of the Debtors;
 - (iii) if necessary, lifting the stay of proceedings prescribed by paragraph 12 of the Receivership Order to permit such bankruptcy applications to be made;
 - (h) directing that, for the purposes of such assignments and applications, the locality of the Debtors shall be Winnipeg, Manitoba, and that it shall be requested that Richter be appointed as trustee (“**Trustee**”)

- (i) directing Richter, upon its appointment as Trustee and in its capacity as Trustee in relation to the estates of each of the Debtors in bankruptcy, to make a motion for consolidation of the administration of the Debtors' bankrupt estates;
- (j) directing that, following the bankruptcies of the Debtors, Net Receivership Proceeds (as hereinafter defined in this Twelfth Report), as same are determined from time to time, be paid or transferred by the Receiver to the Trustee for the purposes of the consolidated Debtors' bankrupt estates;
- (k) approving the NPL Proceeds Preservation Agreement;
- (l) directing that, in accordance with the NPL Proceeds Preservation Agreement, upon the bankruptcy of NPL, Levene Tadman Golub Law Corporation pay to the Trustee the remaining Preserved Proceeds (as hereinafter defined) for the purposes of the consolidated Debtors' bankrupt estates; and
- (m) approving the fees and disbursements of the Receiver, TDS and Katten in the amounts set out in this Twelfth Report.

III. TERMS OF REFERENCE

42. In preparing this Twelfth Report, the Receiver has relied upon information and documents prepared by the Debtors and their advisors, including unaudited, draft and/or internal financial information, the Debtors' books and records, discussions with representatives of the Debtors, including current and former employees, executives, legal counsel to Mr. Peter Nygard, the Debtors and certain related non-Debtor entities, the Lenders and their legal counsel, and information from third-party sources (collectively, the "**Information**"). In accordance with industry practice, except as otherwise described in this Twelfth Report, Richter has reviewed the Information for reasonableness, internal consistency, and use in the context in which it was provided. However, Richter has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Auditing Standards ("**GAAS**") pursuant to the *Chartered Professional Accountant of Canada Handbook* and, as such, Richter expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information.
43. Parties using this Twelfth Report, other than for the purposes outlined herein, are cautioned that it may not be appropriate for their purposes, and consequently should not be used for any other purpose.

44. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Receivership Order.
45. Unless otherwise noted, all monetary amounts contained in this Twelfth Report are expressed in Canadian dollars.

IV. ACTIVITIES OF THE RECEIVER

46. The actions/activities of the Receiver since the commencement of the Receivership Proceedings to January 21, 2021 are detailed in the First Report, the Second Report, the Third Report, the Sixth Report, the Seventh Report, the Eighth Report, the Ninth Report, the Tenth Report, and the Eleventh Report and in various reports filed with the Manitoba Court as supplementary reports. Subsequent to the filing of the Eleventh Report, the Receiver's activities, certain of which are reported on in further detail later in this Twelfth Report, have included:
- (a) maintaining and updating, as necessary, the Receiver's Website, where relevant materials in connection with the Receivership Proceedings are available in electronic format;
 - (b) assisting the Nygard Group in its communications with landlords and suppliers;
 - (c) responding to enquiries from various interested parties, including addressing questions/concerns communicated by parties who contacted the Receiver via the telephone hotline (1.866.737.7587) or email account (nygard@richter.ca) established by the Receiver;
 - (d) communicating with the independent contractors (former employees of the Debtors) retained by the Receiver in respect of various matters in connection with the Receivership Proceedings;
 - (e) considering with TDS and Katten priority employee obligations;
 - (f) liaising with Service Canada on claims submitted by former employees of NIP pursuant to the *Wage Earner Protection Program* ("WEPP");
 - (g) corresponding with former employees of NIP regarding the status of claims and payments under WEPP;
 - (h) communicating with Canada Revenue Agency in connection with its audit of the Nygard Group's payroll remittance and other tax accounts;

- (i) communicating with the Manitoba Department of Finance in connection with certain amounts claimed to be owed by the Debtors in respect of periods prior to the Appointment Date;
- (j) investigating the activities and conduct of the Debtors and their directors, officers and senior management both prior to and subsequent to the Appointment Date and gathering information as to numerous matters related to such conduct arising in the Receivership Proceedings;
- (k) communicating (through TDS and Katten) extensively with various counsel for Mr. Peter Nygard (and other non-Debtor parties) regarding various matters in connection with the Receivership Proceedings;
- (l) preparing and circulating Landlord Claim Notices and Claims Packages (as defined in the Landlords' Charge Claims Procedure Order);
- (m) communicating with counsel to certain landlords regarding the Landlord Terms Order and the Landlords' Claims Process;
- (n) processing payment of the Accepted Landlord Claim Amounts (as hereinafter defined);
- (o) reviewing and considering the Notices of Dispute (as hereinafter defined) filed by certain landlords disputing the amounts of their Landlord Claim, as set out in the Landlord Claim Notice (as hereinafter defined);
- (p) communicating with TDS in connection with the Landlords' Charge Claims Procedure;
- (q) communicating extensively with TDS and Katten in connection with the Canadian Proceedings and the Chapter 15 Proceedings;
- (r) communicating with KLDDiscovery Inc. ("**KLD**") regarding the preservation of certain of the Electronic Records stored on the IT System;
- (s) investigating and considering next steps regarding certain Nygard Group vehicles in the possession of or purportedly transferred to certain (now former) Nygard Group employees prior to the Appointment Date;

- (t) communicating extensively (through TDS) with Levene Tadman Golub Law Corporation (“**LTGLC**”), counsel to the Debtors, in an effort to reach an agreement with NPL as to the preservation of certain of the proceeds generated from the sale by NPL of NPL real property not included as Property pursuant to the Receivership Order (as amended);
- (u) preparing and filing a Notice of Motion (the “**Preservation of Proceeds Motion**”) with the Manitoba Court seeking enforcement of an agreement with NPL as to the preservation of certain of the proceeds generated from the sale, by NPL, of NPL real property not included as Property pursuant to the Receivership Order (as amended);
- (v) attending before the Manitoba Court in connection with the Landlords’ Charge Claims Procedure Order motion;
- (w) communicating with TDS in connection with the Ransomware Attack;
- (x) communicating extensively with various IT consultants in connection with the Ransomware Attack and the migration of data to a Cloud Based Solution (as hereinafter defined);
- (y) attending to and negotiating replacement insurance coverage for any remaining Nygard Group assets (principally servers that previously made up the IT System and are now in storage);
- (z) monitoring the Debtors’ cash receipts and disbursements, and providing funding to the Debtors to pay their post-filing obligations as set out herein;
- (aa) recording receipts and disbursements, including the preparation of the May 15 Interim R&D;
- (bb) preparing this Twelfth Report; and
- (cc) other matters in connection with the administration of the Receivership Proceedings.

Update on Records Preservation / Ransomware Attack

47. In accordance with the document preservation provisions included in the Inkster Approval and Vesting Order, the Receiver commenced a process to migrate the Electronic Records, Programs and the IT System, to the extent feasible, to a cloud-based infrastructure (the “**Cloud Based Solution**”).

48. As previously reported by the Receiver, on or about December 12, 2020, the Receiver's efforts to implement the Cloud Based Solution were meaningfully frustrated by a ransomware attack (described in the Receiver's Second Supplementary Ninth Report) on the IT System (the "**Ransomware Attack**") utilizing the "Netwalker" strain of ransomware. Since becoming aware of the Ransomware Attack, which has compromised certain Electronic Records, Programs and IT infrastructure of the Nygard Organization, the Receiver, along with various IT consultants and the former Nygard IT staff, have been assessing the damage from the Ransomware Attack and the implications thereof, and have worked to recover as much data and as many key Programs as possible. The functionality of the IT System has, however, been permanently compromised and will not operate in the same fashion in which it operated prior to the Ransomware Attack.
49. As to the preservation of Electronic Records for litigation purposes, as noted in prior Reports, the Receiver previously retained KLD, a recognized expert in the areas of eDiscovery and data management to create a forensic copy (i.e. compressed data as it exists at the time of collection, requiring subsequent extraction)(the "**Forensic Copy**") of primarily user-generated data saved to the IT System, as well as email data saved to the Nygard Organization's email servers and the Office365 environment, such that the copied information could be accessed in the future, if required, for a variety of purposes, including litigation. In addition, the Receiver has also copied (the "**Review Copy**") and preserved all Electronic Records within the IT System identified by representatives of the Debtors and/or Peter Nygard following the October 9, 2020 supervised view-only access to the IT System, which was described to the Receiver as containing all Electronic Records potentially relevant to any litigation to which Mr. Nygard and/or any of the Debtors are parties.
50. In an effort to ensure the integrity of the Forensic Copy, KLD is in the process of scanning the Forensic Copy to confirm that the Forensic Copy has not been impacted by the Ransomware Attack (through "dormant" malware predating the execution of the Ransomware Attack). As at the date of this Twelfth Report, KLD has not informed the Receiver of any issues/concerns in respect of the Forensic Copy.
51. The Receiver, with the assistance of Richter's IT Risk Advisory Group, continues to monitor the internet as well as the dark web for new content in connection with the Ransomware Attack. To the best of the Receiver's knowledge, as at the date of this Twelfth Report, the Receiver is not aware of any new postings by the attackers regarding the Ransomware Attack and no data/files purported to have been exfiltrated from the IT System have been released publicly.

Impact of Ransomware Attack on the Preservation of Records

52. Given the limitations imposed on the Receiver as a result of the Ransomware Attack, the Receiver has endeavored to preserve, to the extent feasible, the IT System within the Cloud Based Solution, and make further arrangements that it considers reasonable and appropriate taking into consideration the ongoing needs of the Receivership Proceedings and the significant challenges faced by the Receiver.
53. As noted in the Tenth report, the former Nygard IT Staff and the IT consultants retained by the Receiver have been able to functionally restore certain Programs necessary for the administration of the Receivership Proceedings (and the servers (the “**High Priority Servers**”) which run those Programs), including the Debtors’ main payroll system and certain key accounting systems. These Programs are essential to, among other things, filing corporate tax returns, issuing T4s and W2s to the Debtors’ former employees, paying outstanding vendor balances, administering the WEPP and assessing creditor claims. These Programs have been migrated to the Cloud Based Solution.
54. As also noted in the Tenth Report and above, despite best efforts, the functionality of the IT System has been permanently compromised as a result of the Ransomware Attack. As such, the IT System will not be fully restored and migrated to the Cloud Based Solution. In an effort to limit the expense to restore the functionality of the IT System, the Receiver’s efforts have primarily focused on restoration of High Priority Servers. Servers (and the Electronic Records and Programs contained thereon) which are not considered High Priority Servers have been copied in their “current state” (which may be encrypted) to the Cloud Based Solution to be preserved at a low cost. At present, the monthly costs associated with the Cloud Based Solution total approximately USD\$20,000. The Receiver is, however, considering options to reduce this expense going forward.
55. The Receiver notes that all hardware responsible for operating the IT System (and the data contained therein) has been dismantled and stored at a leased location (the same location where the Physical Records are stored) to ensure that Electronic Records and Programs (in whatever their current state) are preserved. The monthly lease cost (excluding applicable taxes, certain required utility payments and insurance) is approximately \$2,400. The Receiver will report further to the Manitoba Court on these matters, as necessary.

Update on Insurance Coverage

56. The Debtors' insurance policy providing, among other things, commercial general liability and property coverage expired June 1, 2021. In anticipation of the expiration of the Debtors' insurance, the Receiver, in consultation with the Nygard Group's insurance broker, sought to renew the existing insurance policy (albeit updated to reflect the current status of the Debtors' assets and operations). The incumbent insurance provider, however, was not willing to maintain the existing coverage and, upon renewal, would only provide \$1 million in commercial general liability coverage (previously \$5 million plus \$5 million excess liability coverage). In addition, the cost to be paid (approximately \$58,000, including approximately \$23,000 in unpaid premiums predating the receivership) to renew coverage with the incumbent insurer was, in the Receiver's view, excessive given the coverage to be provided.
57. In consideration of the above, the Receiver contacted Firstbrook, Cassie & Anderson Ltd. ("FCA"), insurance brokers that offer a specialty insurance program tailored to the unique needs of insolvent estates, to provide a proposal for the Debtors' current and go forward insurance needs taking into consideration the Debtors' limited ongoing operations and Property (principally servers and other IT System related equipment stored at a leased location). Through FCA, the Receiver secured new commercial general liability coverage (\$1 million plus \$9 million excess liability coverage) as well as property coverage at a cost of approximately \$600 per month. This new coverage has been in effect since June 1, 2021.

V. LANDLORDS' CHARGE CLAIMS PROCESS

58. On March 3, 2021, the Manitoba Court granted the Landlords' Charge Claims Procedure Order setting out the process to quantify and resolve the claims of Landlords for any Unpaid Rent in respect of the Leases secured by the Landlords' Charge.
59. In accordance with the Landlords' Charge Claims Procedure Order, on March 9, 2021, the Receiver assembled and delivered, via email, to all known Landlords impacted by the Landlords' Charge Claims Procedure Order, a Claims Package, including a Landlord Claim Notice setting out the amount and calculation of each Landlord's claim for Unpaid Rent, as per the Debtors' books and records.
60. In accordance with the approved Landlords' Charge Claims Process, any Landlord that did not dispute the amount of its Landlord Claim, as set out in the Landlord Claim Notice delivered to such Landlord, was not required to take any further action and the Landlord Claim of such Landlord was deemed to be the amount set out in the Landlord Claim Notice.

61. Any Landlord wishing to dispute the amount or calculation of its Landlord Claim, as set out in the Landlord Claim Notice delivered to such Landlord, was required to deliver a Notice of Dispute, the form of which was included in the Claims Package, to the Receiver prior to 5:00 p.m. (Central Daylight Time) on April 2, 2021 or such later date as may be ordered by the Manitoba Court (the “**Claims Bar Date**”). In accordance with the Landlords’ Charge Claims Procedure Order, Landlords that did not deliver a Notice of Dispute by the Claims Bar Date were treated as having accepted the amounts of their respective Landlord Claims as set forth in the applicable Landlord Claim Notice and are forever barred from claiming a greater amount of Unpaid Rent as secured by the Landlords’ Charge.
62. A summary of the claims of Landlords for Unpaid Rent secured by the Landlords’ Charge, including any Notices of Dispute delivered to the Receiver prior to the Claims Bar Date, is outlined in the below table. **Appendix “A”** to this Twelfth Report contains a detailed schedule of Landlord Claims and the current status of those claims.

Landlord Claim Status	Number of Claims	Value of Claims (\$)
Accepted Landlord Claims	149	2,586,098
Disputed Landlord Claims	14	3,480,316
Total	163	6,066,414

63. As noted in the above summary:
- (a) 163 Claims Packages enclosing, among other things, the applicable Landlord Claim Notice, were sent to Landlords in accordance with the Landlords’ Charge Claims Procedure Order;
 - (b) 149 claims of Landlords for Unpaid Rent secured by the Landlords’ Charge totaling \$2,586,097.72 were not disputed by Landlords and are deemed to be accepted pursuant to the Landlords’ Charge Claims Procedure Order (the “**Accepted Landlord Claim Amounts**”), and
 - (c) 14 Notices of Dispute (the “**Disputed Landlord Claims**”) were delivered to the Receiver prior to the Claims Bar Date claiming approximately \$3.5 million in Unpaid Rent, approximately \$3.3 million of which is accounted for by two Notices of Dispute. According to the Debtors’ books and records (and the corresponding Landlord Claim Notices), the amounts owing in respect of the 14 Disputed Landlord Claims totals approximately \$120,000.

64. Pursuant to the Landlords' Charge Claims Procedure Order, the Receiver was authorized and directed to pay Landlords the amount of their applicable Landlord Claim, once determined, in accordance with the timing set out in the Landlords' Charge Claims Procedure Order. As at the date of this Twelfth Report, the Receiver has paid the Accepted Landlord Claim Amounts, totaling \$2,586,097.72.
65. The Receiver is currently reviewing the Notices of Dispute delivered to the Receiver and will work to resolve the disputes raised therein with the applicable Landlord. In the event the Receiver is unable to resolve a dispute raised in a Notice of Dispute by negotiation with such Landlord within a period or in a manner satisfactory to the Receiver and the applicable Landlord, the Manitoba Court shall have the authority to determine such dispute on a summary basis on a motion made by the Receiver or the applicable Landlord as contemplated by the Landlord Terms Order. The Receiver will report back to the Manitoba Court in respect of the Disputed Claims, as necessary.
66. It is important to note that the Landlords' Charge Claims Process only addresses Landlord claims for Unpaid Rent secured by the Landlords' Charge. Any other amounts claimed by Landlords, and the priority of such amounts, as against the Nygard Group are not secured by the Landlords' Charge and are not affected by the Landlords' Charge Claims Process.

VI. PRESERVATION OF PROCEEDS OF NPL PROPERTY SALES

67. Based on the evidence of Greg Fenske affirmed in his Affidavit of November 5, 2020, after the sales of the Notre Dame Property, the Toronto Property, the Inkster Property and the Broadway Property, the only remaining assets of NPL of value were the real property of NPL located at 40 Fieldstone Drive, Woodbridge, Ontario (the "**Fieldstone Property**") and the leasehold interests (leased from the Province of Manitoba) of NPL in Lots 15 and 17, Block 11 located at Falcon Lake, Manitoba, and the premises constructed thereon, (collectively, the "**NPL Falcon Lake Property**"). The NPL Falcon Lake Property is contiguous to Lot 16, Block 11 at Falcon Lake, which lot is leased by the Province of Manitoba to The Estate of Hilka Nygard (the "**Estate**") (together with the premises constructed thereon, the "**Estate Property**"). The Receiver understands that Peter Nygard is the sole beneficiary of the Estate. The three adjoining lots (15, 16 and 17) and the premises constructed thereon collectively comprise the "**Falcon Lake Cottage**" property.
68. In late February, 2021, the Receiver was contacted by Mr. D. Sigmar of Sigmar Mackenzie Real Estate Services Ltd. ("**Sigmar Mackenzie**") who advised the Receiver that he had been working with representatives of NPL and Mr. Nygard to identify a potential purchaser for the Falcon Lake Cottage, including all three lots and the structures located thereon. Mr. Sigmar further advised the Receiver that a conditional sale for the Falcon Lake Cottage had been negotiated and that he was contacting the Receiver in connection with such

sale. It appears that in due course a listing agreement (the "**Sigmar MacKenzie Listing Agreement**") for the sale of the Falcon Lake Cottage was entered into among NPL, the Estate and Sigmar MacKenzie providing for, among other things, a 4% commission (ultimately negotiated by NPL to 2%) to be paid to Sigmar MacKenzie upon a completed sale of the Falcon Lake Cottage. Attached hereto as **Appendix "B"** is a copy of the Sigmar MacKenzie Listing Agreement.

69. As noted above, the General Order limited the scope of the Receivership Order in relation to assets of NPL, such that the Fieldstone Property and the NPL Falcon Lake Property are not "Property" for the purposes of the receivership and are not subject to the possession and control of the Receiver. The view of the Receiver, however, is that NIP is a substantial creditor of NPL, by reason of NPL's intercompany obligation to NIP. In addition, the assets and liabilities of NPL may be consolidated with those of NIP and some or all of the other Debtors for creditor purposes. In either case, the Receiver and unsecured creditors of NIP or the broader Nygard Group, as the case may be, have an interest in the preservation of proceeds of the dispositions of both the NPL Falcon Lake Property and the Fieldstone Property, to maximize unsecured creditor recoveries.
70. Determinations in the present motion brought by the Receiver of issues as to the status of intercompany accounts, solvency, subrogation and consolidation will affect the claims of the Receiver, NIP, NPL and creditors generally, and determine issues such as the entitlement to "net receivership proceeds" and access to NPL assets/proceeds (including proceeds from the sales of the NPL Falcon Lake Property and the Fieldstone Property) for creditor purposes, among others. The Receiver was (and is) of the view that, for the reasons described in paragraph 69 above, it is important to preserve certain of the proceeds from the sale of the NPL's remaining assets pending the Manitoba Court's final determination of such issues.
71. Upon being advised of the prospective sale of the Falcon Lake Cottage, the Receiver and TDS considered the remedies available to the Receiver to attempt to preserve proceeds. TDS contacted LTGLC in connection with the NPL Falcon Lake Property and discussed, among other things, the cooperation of NPL in preserving proceeds from the sale of the NPL Falcon Lake Property until such time as relevant issues had been finally determined.
72. In the course of these initial discussions, LTGLC advised that the Fieldstone Property was also listed for sale and that an agreement for the sale of the Fieldstone Property was expected to be entered into shortly. Accordingly, there was also discussion of NPL's cooperation in preserving proceeds from the sale of the Fieldstone Property.

73. Through subsequent communications between TDS and LTGLC, the Receiver was informed that an offer for the Falcon Lake Cottage in the amount of \$2.5 million had been accepted, and that an offer for the Fieldstone Property in the amount of \$943,000 had been accepted.
74. In the course of the communications between TDS and LTGLC, LTGLC reiterated NPL's claim that any funds generated from the sale by the Receiver of the Notre Dame Property, the Toronto Property, the Inkster Property and the Broadway Property in excess of the amount required to repay the Lenders guaranteed debt and certain other obligations belonged to NPL. LTGLC further advised of NPL's intention to use the proceeds from the sales of the NPL Falcon Lake Property and the Fieldstone Property to pay certain NPL expenses.
75. On a cooperative basis, recognizing that a portion of the proceeds of the sale of the Falcon Lake Cottage would accrue to the Estate by reason of its interest in Lot 16, and further recognizing that certain other payments would be expected to be made by NPL from the proceeds of the sales of the NPL Falcon Lake Property and the Fieldstone Property, the NPL Proceeds Preservation Agreement was reached between the Receiver and NPL, initially by an exchange of emails between TDS and LTGLC over the period March 5 - 8, 2021, and thereafter by means of a series of email communications and telephone discussions involving TDS, LTGLC and Lerners LLP ("**Lerners**"), counsel to Edson's/Brause, which resulted in certain disputed terms being finally resolved on or about May 7, 2021. Cumulatively, the terms of the NPL Proceeds Preservation Agreement can be summarized as follows:
- (a) subject to the making of certain payments as set forth below, the gross sale proceeds ("**Gross Sale Proceeds**") from the sales the Falcon Lake Cottage and the Fieldstone Property will be held and preserved by LTGLC pending a final court determination (the "**Final Order**") of the issues as to (i) the state of the intercompany accounts involving NPL, NEL and NIP, (ii) the respective claims of NPL and NIP (if any) to be subrogated to the security held by the Applicant as against the property, assets and undertakings (as the case may be) of the Debtors, relating to or arising from the Credit Agreement, and the extent/amount of such subrogation, (iii) the consolidation of the Debtors for creditor purposes, and (iv) the bankruptcy of NPL, and thereafter paid out in accordance with the Final Order;
 - (b) LTGLC expects NPL to direct it to pay from the Gross Sale Proceeds obligations of NPL from time to time, which the Receiver understands will only include:
 - (i) payment of usual closing costs ("**Closing Costs**"), including real estate commissions, usual adjustments and legal fees;

- (ii) payment to Edson's/Brause (the "**Edson's Payment**") of the amounts of (i) the Settlement Amount (USD\$300,000) and the Proposal Trustee Fees (\$300,000), as described in the E/B Settlement Agreement, the payment of which amounts were secured by certain assignments (describing an obligation of \$700,000) in favour of Edson's (the "**Falcon Lake Lease Assignments**") of NPL's leases of the NPL Falcon Lake Property and by a USD\$700,000 real property mortgage (the "**Fieldstone Mortgage**") in favour of Edson's registered against the Fieldstone Property, and (ii) the amount of USD\$237,500 (the "**Edson's USD\$237,500 Claim**") to repay amounts advanced by Edson's in or about November 2020 for the payment of NPL professional accounts of LTGLC, Albert Gelman Inc. ("**AGI**") and Fred Tayar & Associates ("**Tayar**"), the repayment of which to Edson's is also secured by the Fieldstone Mortgage, such payments to be in full settlement of the secured claims of Edson's and in consideration of the discharge of the Falcon Lake Lease Assignments and the Fieldstone Mortgage;
- (iii) payment of outstanding professional accounts (the "**Debtors' Outstanding Professional Accounts**") of LTGLC, AGI and Tayar in the amount of \$246,693.40, on the basis that a certain real property mortgage registered by LTGLC against the Fieldstone Property to secure its professional fees be discharged;
- (iv) provision for retainers to be set aside for the payment of further professional accounts of LTGLC, AGI and Tayar from time to time for services to NPL in regard solely to NPL matters, in the amounts of \$100,000 (LTGLC), \$50,000 (AGI) and \$100,000 (Tayar). Since the making of these arrangements, LTGLC has advised that it requires that an additional retainer in the amount of \$100,000 be set aside for its services to NPL;
- (v) payment of ordinary course obligations of NPL to Greg Fenske and Steve Mager which shall relate solely to services provided by them in connection with the business of NPL, in the amounts of (i) \$71,500 to Greg Fenske for all services provided by Greg Fenske for the period from the date of the receivership to April 30, 2021, including as a "defacto director and officer" of NPL during the period from March 18, 2020 to September, 2020, and thereafter formally as the sole director and an officer of NPL, together with the amount of \$6,500/month for such services, for so long as Greg Fenske remains a functioning director and officer of NPL, and (ii) \$55,000 to

Steve Mager for all services provided by Steve Mager after the date of the receivership, including in relation to the maintenance, operation and sale of the NPL Falcon Lake Property and his claim to be entitled to a "commission" in relation to the sale of the Falcon Lake Cottage, in respect of all of which Steve Mager will provide a release;

- (vi) payment to counsel for the Estate of an amount in the range of \$200,000 - \$300,000 (the "**Estate Advance**") to make provision for payment by the Estate of (i) legal fees, and (ii) capital gains tax expected to accrue from the sale of Lot 16; and
- (vii) payment to the Estate of a further amount (the "**Estate Balance**") which, together with the Estate Advance, will total the amount of \$976,000, to be allocated from the net sale proceeds of the Falcon Lake Cottage to the value of Lot 16.

(c) LTGLC will thereafter provide the Receiver with seven days' notice (a "**Seven Day Notice**") of the intention to pay additional amounts from time to time from the Gross Sale Proceeds such that the Receiver can take such actions in respect of such payments as the Receiver considers appropriate.

76. Copies of the relevant email communications between TDS and LTGLC in connection with the NPL Proceeds Preservation Agreement are attached hereto as **Appendix "C"**.

77. TDS' March 5, 2021 email to LTGLC provides expressly that:

"The Receiver's purposes in trying to preserve the Gross Sale Proceeds is to try to preserve funds for payment of NPL creditor claims, including the claim of NIP based on the Receiver's view of the intercompany accounts, and more generally for creditors of the "consolidated" [Debtors], should a court order that the [Debtors] be consolidated for creditor payment or bankruptcy purposes. By means of the arrangements above, the Receiver is not purporting to (and, in any event, cannot) "make determinations" as to, or approve, the contemplated payments for preference purposes."

78. Over the course of communications leading to finalizing the NPL Proceeds Preservation Agreement terms, there were disagreements as to whether certain amounts proposed by NPL to be paid from the Gross Sale Proceeds were consistent with the agreement, as it was originally described in TDS' March 5, 2021 email to LTGLC and accepted by NPL, as described in LTGLC's email to TDS on March 8, 2021. On or about April 9, 2021, LTGLC included in an email correspondence a Seven Day Notice, which prompted the Receiver to file with the Manitoba Court the Preservation of Proceeds Notice of Motion on April 16, 2021, intended to set

down for hearing on May 12, 2021 those issues in respect of the NPL Proceeds Preservation Agreement that were contentious. In particular:

- (a) the matter of determining the Estate Balance (that is, ultimately, determining the total amount of the Gross Sale Proceeds to be attributed to Lot 16) was contentious, in light of substantial investments made by NIP in the development and renovation of certain of the Falcon Lake Cottage premises and the Receiver's view of other factors which it considered to be relevant to value.

LTGLC provided certain appraisals of Lots 15, 16 and 17, which supported an average value of \$1,077,500 for Lot 16, which was the total amount initially proposed by NPL to be paid to the Estate.

The Receiver had discussions with the appraisers and Mr. Sigmar, and further discussions between TDS and LTGLC resulted in a value of \$976,000 being agreed to be attributed to Lot 16. Copies of the appraisals for each of the Lots are attached as exhibits to the Affidavit of Robert Martell affirmed April 28, 2021 and the Affidavit of Myron Dyck affirmed April 28, 2021, both of which were filed by the Debtors in connection with the Preservation of Proceeds Motion;

- (b) the amount to be distributed to Mr. Fenske was contentious. It was initially proposed by NPL that it pay Mr. Fenske \$135,000 in consideration of his services to NPL from the Appointment Date to March 30, 2021, together with a monthly amount of \$10,000 thereafter. An invoice for \$135,000 was submitted by Mr. Fenske to NPL and provided to the Receiver.

The Receiver understood from the original March 5-8 email exchange that the payment to Mr. Fenske was solely to be in relation to his services as a director and officer of NPL. The Receiver further understood that Mr. Fenske became a director of NPL in September 2020 and that Mr. Fenske was being paid \$2,000/week through a numbered company. Thus, it appeared to the Receiver that the amounts of \$135,000 and \$10,000 per month were beyond what was intended by the preservation terms initially agreed upon.

It is clear from Mr. Fenske's participation in these proceedings that he has provided significant services to NPL since March 2020 and that, as these proceedings are ongoing, additional efforts of Mr. Fenske, on behalf of NPL, will be required. Mr. Fenske has acted as a director of NPL since September 2020 in circumstances in which it is typically difficult to engage a "third party" director, which appears to warrant meaningful compensation. In the result, it was agreed that Mr. Fenske would be paid from the Gross Sale Proceeds the amount of \$71,500 for his services to NPL from the

date of the receivership to April 30, 2021, and thereafter \$6,500/month for so long as he is a functioning director and officer of NPL;

- (c) the amount to be distributed to Mr. Mager was contentious. It was initially proposed by NPL that it pay Mr. Mager a “commission” of 5% of the Falcon Lake Cottage sale price (i.e. \$125,000) in consideration of his services in selling the Falcon Lake Cottage, together with a monthly amount of \$10,800 commencing April 1, 2021. An invoice for the 5% commission (\$125,000) was submitted by Mr. Mager to NPL and provided to the Receiver.

The Receiver understood from the original March 5-8 email exchange that the payment to Mr. Mager was solely to be in relation to his services as a director and officer of NPL. However, Mr. Mager did not become either a director or officer of NPL. In addition, notwithstanding that Mr. Mager was not a real estate agent and could not properly charge a real estate commission, the Receiver understood that, in the ordinary course, a commission to a “cooperative” real estate agent in respect of the same sale would not be as high as 5%. Based on the Sigmar MacKenzie Listing Agreement, any commissions payable to a “cooperative” agent would be limited to 1.5% and paid from the Sigmar MacKenzie commission entitlement. Further, Mr. Mager’s alleged commission arrangement does not appear to have been documented and his roles in relation to the vendors and the purchaser were not clarified. In the Receiver’s view, the amount of \$125,000 was excessive in consideration of what appeared to be Mr. Mager’s contribution to the sale of the Falcon Lake Cottage.

It is evident that Mr. Mager has provided maintenance and oversight services to NPL with respect to the Falcon Lake Cottage, and other services to NPL since the Appointment Date, and that his efforts in regard to the sale of the Falcon Lake Cottage and its closing appeared to warrant compensation. In the result, it was agreed that Mr. Mager would be paid the all-inclusive sum of \$55,000 for all services to NPL from the date of the receivership, including in relation to the sale of the NPL Falcon Lake Property, and that Mr. Mager would provide a release accordingly;

- (d) the Edson’s USD\$237,500 Claim was not referenced in the original March 5-8 email exchange. It was subsequently communicated to the Receiver that, in addition to the Settlement Amount (USD\$300,000) and the Proposal Trustee Fees (\$300,000), as described in the E/B Settlement Agreement, Edson’s had provided USD\$237,500 for the benefit of NPL, to pay certain professional accounts of LTGLC, Tayar and AGI, which amount was secured by the Fieldstone Mortgage and that Edson’s would not agree to discharge the Fieldstone Mortgage to accommodate a sale of the Fieldstone Property unless the Edson’s USD\$237,500 Claim was paid from the proceeds of such a sale.

The Receiver required evidence that, in fact, Edson's had provided the USD\$237,500 amount to or to the benefit of NPL, or other evidence of other good and valuable consideration, to support the alleged mortgage security. Following email communications and discussions with LTGLC and Lerners, and the provision to the Receiver of various (albeit sometimes conflicting) documents, it was established to the satisfaction of the Receiver that (i) Edson's had provided certain funds to 2361342 Ontario Inc. ("**236**"), a corporation of which Sandra Fawcett appears to be director, (ii) Edson's directed 236 to advance the amount of USD\$237,500 from those funds, by means of 2 advances, to 11997645 Canada Inc. ("**119**"), a corporation of which Mr. Fenske appears to be director, intending that such advances be used to pay professional accounts of NPL and that such advances be secured by the Fieldstone Mortgage, (iii) from the funds advanced through 236, 119 made payments of amounts of NPL professional accounts totaling USD\$237,500 directly to LTGLC, Tayar and AGI by means of wire transfers, and (iv) 119 was used as a conduit for such payments as NPL does not have a bank account. In the result, it was agreed that either (v) upon the closing of a sale of the Fieldstone Property, the Edson's USD\$237,500 Claim will be paid, or (vi) in the event that Edson's purchases the Fieldstone Property, the Edson's USD\$237,500 Claim will be set off and the balance of the proceeds of such purchase will be remitted to LTGLC and included in the Gross Sale Proceeds;

- (e) proposals by NPL that (i) monthly amounts of \$5,000 and \$8,333 be paid from the Gross Sale Proceeds to Anna Garcia and Joey Vasquez commencing April 1, 2021 (notwithstanding that, on the basis of its own evidence in these Receivership Proceedings, NPL carries on no active business and that following the sale of the NPL Falcon Lake Property and the Fieldstone Property, NPL will have no remaining assets), and (ii) an amount in excess of \$300,000 be paid from the Gross Sale Proceeds to Mr. Nygard's personal legal counsel, were objected to by the Receiver as being beyond the terms of the NPL Proceeds Preservation Agreement. Payment of these amounts have not been pursued further by NPL.

- 79. Following settlement, on May 7, 2021, of the contentious matters described above, the Proceeds Preservation Motion was adjourned to June 17, 2021 for the purpose of maintaining a set hearing date in the event that additional issues arise in connection with the NPL Proceeds Preservation Agreement.

NPL Proceeds held in Trust by LTGLC

80. The sale of the Fieldstone Property for the price of \$943,000 did not close. TDS has been advised by LTGLC that NPL expects that another purchaser for the Fieldstone Property can readily be found, to close within a reasonable period, perhaps even at a somewhat higher price. LTGLC has also advised TDS that Edson's may be interested in acquiring the Fieldstone Property itself, at a demonstrable market price. As a result, the Receiver expects that in due course the Gross Sale Proceeds presently being held by LTGLC will be supplemented by the net proceeds of a sale of the Fieldstone Property.
81. Based on the above, and taking into consideration the terms of the NPL Proceeds Preservation Agreement, the estimated net realizations from the sale of the Fieldstone Property and the Debtors' previous statements to the Manitoba Court that NPL has no other realizable assets, the net realizable value of NPL property not subject to the Receivership Order (as amended) is estimated at approximately \$640,000 (the "**Preserved Proceeds**"), which will be the amount, subject to any further disbursements therefrom, held by LTGLC in its trust account pursuant to the NPL Proceeds Preservation Agreement. The below schedule sets out the Receiver's understanding of the estimated Preserved Proceeds in connection with the sale of the NPL Falcon Lake Property and the future sale of the Fieldstone Property:

Estimate of Preserved Proceeds		(\$CAD)
<i>(in 000's)</i>		
Receipts		
Proceeds from Sale of Falcon Lake Cottage		2,500
Disbursements		
Estate Balance	(976)	
Debtors' Outstanding Professional Accounts	(247)	
Retainers for Professionals Accounts	(350)	
Mager Payment	(55)	
Fenske Payments	(78)	
Edson's Payment	(721)	
Real Estate Commissions (NPL portion)	(32)	
Other Closing Costs (Professional Fees)	(14)	
Net Other	3	
Total Outflows		(2,470)
Cash On Hand in LTGLC Trust Account		30
Estimate of Future Receipts / Disbursements		
Estimated Net Proceed from Sale of Fieldstone Property	900	
Payment of Edson's USD\$237,500 Claim	(290)	
Net Inflows		610
Estimated Preserved Proceeds		640

VII. MAY 15 INTERIM R&D

82. The May 15 Interim R&D is summarized as follows:

Nygard Group		
Interim Statement of Receipts and Disbursements		
For the Period March 18, 2020 - May 15, 2021		
(in \$000s)		
		Notes
Cash on Hand - March 18, 2020	73	1
Receipts		
Accounts Receivable, Real Estate and Other Collections	47,483	2
Sales Receipts	43,852	3
Receiver's Borrowings	30,082	4
Total Receipts	121,416	
Disbursements		
Payroll	13,745	5
Rent	6,175	6
Utilities / Operating Expenses / Other	3,446	7
Insurance	803	8
Postage / Courier / Logistics Providers	1,135	9
Asset Protection Services	327	10
Chargebacks / Returns / Bank Fees	514	11
Consultant Fees	2,880	12
Professional Fees	6,438	13
Receiver's Sales Taxes	201	14
Debtors' Sales Taxes	3,971	15
Payment of Landlord Charge	2,586	16
Total Disbursements	42,221	
Excess of Receipts over Disbursements	79,195	
Distribution to Lenders	(66,466)	17
Cash on Hand - May 15, 2021	12,803	

Notes:

- 1 Represents cash in the Debtors' bank accounts on or about the Appointment Date.
- 2 Represents the collection of accounts receivable including sales tax, the sale of IP, the net sale proceeds from real estate, and other miscellaneous receipts.
- 3 Represents receipts from ecommerce sales, retail store sales, and the sale of FF&E including sales taxes.
- 4 Receiver's Borrowings funded via Receiver's Certificates issued to the Lenders. The actual amount owing on the Receiver's Certificates may vary slightly from the numbers presented herein due to foreign exchange.
- 5 Represents gross wages, expenses, benefits and certain accrued vacation obligations paid to the Debtors' former employees, as well as employee health and dental benefits. Total includes certain pre-filing wages and other amounts owed to certain former employees.
- 6 Represents rent paid to landlords during the Liquidation Sale and rent paid in respect of a distribution centre located in Woodbridge, Ontario.
- 7 General operating and other expenses (net of refunds) including unrealized foreign exchange losses and certain IT costs.
- 8 Payment of insurance premiums since the Appointment Date including annual premiums for the periods ending May 31, 2021 and June 30, 2021.
- 9 Represents deposits and payments (net of refunds) paid to logistics providers for the transport of goods.
- 10 Represents costs incurred for security services at various Debtors locations.
- 11 Represents bank charges, credit card chargebacks and related amounts.
- 12 Represents fees and expenses paid to the Consultant in accordance with the Consulting and Marketing Agreement.
- 13 Represents the fees, disbursements of the Receiver, TDS and Katten paid by the Receiver. Amounts include payment for certain fees and disbursements incurred prior to the Appointment Date.
- 14 Consists of sales taxes paid on disbursements by the Receiver, net of any sales tax refunds.
- 15 Consists of sales taxes paid by the Debtors after the Appointment Date.
- 16 Pursuant to the Landlords' Charge Claims Procedure Order, the Receiver is authorized to pay Approved Landlord Claims (amounts do not include the settlement of the Disputed Landlord Claims).
- 17 Pursuant to the Receivership Order, the Receiver is authorized to remit to the Lenders any and all proceeds from the Property. This is consistent with the operations of the Credit Facility prior to the granting of the Receivership Order. The amount includes interest and fee payments on the Credit Facility Indebtedness and the Receiver's Borrowings of approximately USD \$1.1 million, in accordance with the Term Sheet and the Credit Agreement and also includes approximately \$1.0 million in fees relating to the Lender's Holdback as provided for pursuant to the Receiver Term Sheet. The Receiver notes that the Lender returned approximately \$1.0 million to the Receiver relating to excess funds held but the Lenders, as noted in the Seventh Report. These funds were applied against the Distribution to Lenders shown above. The Receiver also notes that on March 26, 2021 a final distribution of USD\$331,556.98 was issued to the Lenders, in accordance with the Landlords' Charge Claims Procedure Order.

83. The Receiver notes the following in respect of the May 15 Interim R&D:

- (a) pursuant to the provisions of the Receivership Order, the Debtors' cash management system (the "**Cash Management System**"), as described in detail in the Dean Affidavit, continued to operate in the normal course without material change from the Appointment Date until September 4, 2020. The Debtors' primary banking accounts utilized in the Cash Management System are held at BMO (the "**BMO Accounts**") and the Bank of America (the "**BOA Accounts**"). In addition to the BMO Accounts and the BOA Accounts, the Receiver has opened two (2) additional estate accounts (the "**Estate Accounts**", and together with the BMO Accounts and the BOA Accounts, the "**Receivership Accounts**") at BMO. On September 4, 2020, the Receiver altered the Cash Management System such that all future proceeds from the Property would accumulate in the Receivership Accounts. The May 15 Interim R&D includes the combined receipts and disbursements in the Receivership Accounts as well as receipts applied directly against the Credit Facility or Receiver's Borrowings;
- (b) as shown in the May 15 Interim R&D, receipts totaled approximately \$121 million, comprised of approximately \$47 million related to the collection of accounts receivable, net real estate collections, wholesale inventory, IP sales, building sales and other miscellaneous receipts, \$44 million related to the collection of retail store, e-commerce and FF&E sales, and \$30 million related to the Receiver's Borrowings;
- (c) disbursements during the period of the May 15 Interim R&D, totaled approximately \$42 million and primarily consisted of payroll and source deductions, rent, operating disbursements, consultant fees and professional fees;
- (d) pursuant to the terms of the Receivership Order and the Receiver Term Sheet, and consistent with the operation of the Credit Facility before the commencement of the Receivership Proceedings, the Receiver Term Sheet and the Receivership Order, proceeds from the Property, totaling approximately \$66 million (including Receiver's Borrowings of approximately \$30 million and amounts due under the Credit Agreement of approximately \$36 million), has been distributed to the Lenders, in full satisfaction of the secured amounts owing to the Lenders; and
- (e) the remaining funds on hand, as at May 15, 2021, totaled approximately \$12.8 million.

84. The Receiver notes that the Debtors and the Receiver will continue to incur go forward expenses (the “**Remaining Receivership Expenses**”) related to the Receivership Proceeding, which are not captured in the May 15 Interim R&D, including:
- (a) potential employee priority claims which, to the best of the Receiver’s knowledge, total approximately \$720,000;
 - (b) additional Unpaid Rent claims subject to the Landlords’ Charge, the settlement of which has been estimated to total approximately \$200,000; and
 - (c) other disbursements (the “**Remaining Disbursements**”) in connection with the Debtors’ limited remaining operations in Manitoba, including for records preservation, storage and access, as well as the administration of the Receivership Proceedings and the considerable expense necessary to file the outstanding tax returns for the Canadian Debtors (2020 and 2021) and the US Debtors (2019, 2020 and 2021). For the purposes of this Twelfth Report, including the consideration of the treatment of the Net Receivership Proceeds (as hereinafter defined), the Receiver has conservatively estimated the Remaining Disbursements to total \$2 million. The amount of the estimated Remaining Disbursements may, however, be considerably less depending upon the course of these Receivership Proceedings.
85. The Receiver will report further to the Manitoba Court in respect of the Remaining Receivership Expenses in future.
86. In the result:
- (a) it is expected that there will be remaining net proceeds (“**Net Receivership Proceeds**”) from the disposition of Property following payment of all Remaining Receivership Expenses;
 - (b) for the purposes of this Twelfth Report, the Receiver estimates Net Receivership Proceeds to total approximately \$9.9 million; and
 - (c) the Net Receivership Proceeds will be more or less than \$9.9 million, depending upon the final amount of the Remaining Receivership Expenses.

VIII. CLAIMS TO THE NET RECEIVERSHIP PROCEEDS

87. Claims to the Net Receivership Proceeds depend upon whether claims are to be determined on a stand-alone “separate corporation” basis, or on the basis that the Debtors should be substantively consolidated for creditor purposes. The Manitoba Court has earlier received materials and heard arguments respecting these matters, and has made certain findings relevant to this analysis.
88. The determination of claims on a separate corporation basis, and the underlying analysis, is particularly relevant to NPL, which has asserted in these proceedings that it is entitled to have all or a substantial portion of the Net Receivership Proceeds paid to it, that it is solvent and that only NPL and “direct creditors” of NPL should benefit from its share of the Net Receivership Proceeds. In general, NPL has argued that it has no third party creditors, however, it is apparent that a significant tax liability has accrued to NPL in respect of the sales of its properties in the course of these proceedings, other tax liabilities may accrue in relation to dispositions of the NPL Falcon Lake Property and the Fieldstone Property, and NPL may have other third party creditor obligations. In addition, on the basis of the Debtors’ financial information, NPL is indebted to NIP in the amount of approximately \$2.5 million, and NEL, which is NPL’s parent corporation, is indebted to NIP in the amount of approximately \$18.1 million.
89. Determination of claims on a separate corporation basis requires a complex analysis involving:
- (a) identification of receivership proceeds attributable to the realization upon assets of affected Debtors. In this case, only NIP, NPL and NI had assets which were included as Property in the receivership and which were sold or otherwise realized upon by the Receiver;
 - (b) allocation of expenses incurred by the Receiver as against the proceeds attributable to NIP, NPL and NI asset realizations in the course of the receivership;
 - (c) allocation of priority claims and court-ordered charges, including statutory priorities, the Receiver’s Borrowing Charge, the Receiver’s Charge and the Landlords’ Charge, as against the proceeds attributable to NIP, NPL and NI asset realizations in the course of the receivership;
 - (d) allocation of repayment of the Credit Facility from proceeds of NIP, NPL and NI asset realizations, and determination of related subrogation rights, if any; and
 - (e) reliance upon the Nygard Group financial information in relation to intercompany obligations as among the Debtors and other matters.

90. Determination of claims on a consolidated basis does not require any of the above analysis. Once determined that the Debtors should be treated as a “single entity” for creditor purposes, all Net Receivership Proceeds would be shared (generally on a pro rata basis) by all creditors of the Nygard Group.
91. In comparing the outcomes (as more particularly described later in this Twelfth Report) of the “separate corporation” and consolidation analyses in this receivership, in the circumstances of the Debtors and given certain findings already made by the Manitoba Court, it is the conclusion of the Receiver that:
- (a) there is no outcome that generates meaningful equity in NPL;
 - (b) any equity in NPL is ultimately subject to the substantial intercompany obligation of NEL (NPL’s 100% owner) to NIP, to the benefit of NIP’s creditors;
 - (c) it is fair and reasonable that the assets and liabilities of the Debtors, including NEL and NPL, should be substantively consolidated for creditor purposes; and
 - (d) the Debtors should be assigned/ordered into bankruptcy, with their estates to be administered on a consolidated basis.

COMMENTS ON SEPARATE CORPORATION ANALYSIS

92. The Receiver has reviewed its receipts and disbursements and prepared an estimated Net Receivership Proceeds Analysis by Operating Entity (the “**Separate Corporation Analysis**”), subject to the following parameters and assumptions (a schedule summarizing the Separate Corporation Analysis is included in paragraph 104 of this Twelfth Report):

Receivership Proceeds

93. As at the date of this Twelfth Report, the Receiver received proceeds from the realization upon assets of NIP, NI and NPL as follows:

Realizations by Debtor <i>(in \$000s)</i>	
NIP	50,917
NI	11,831
NPL	28,579

Allocation of Expenses

94. The Receiver has made a preliminary allocation of receivership expenses as against the proceeds of NIP, NI and NPL asset realizations, based on the following considerations:
- (a) based on advice from TDS, the principles to be applied by a receiver in making such an allocation are that:
 - (i) in general, allocations are done on a case-by-case basis, involving an exercise of discretion by the receiver;
 - (ii) an allocation does not require a strict cost/benefit analysis or that costs be borne equally or on a pro rata basis; and
 - (iii) ultimately, costs are to be allocated in a fair and equitable manner that does not work to readjust the priorities of any creditor.
 - (b) the allocation of expenses involves a review of transactions recorded by the Receiver. Since the commencement of the Receivership Proceedings, the Receiver has recorded in excess of 17,000 transactions, many of which are batch payments (i.e. one cash outflow for the payment of several invoices). A comprehensive review of the transactions, including the settlement of any disputes regarding attribution, would be a time-consuming and likely expensive exercise to the detriment of unsecured creditors who would ultimately bear the costs associated with such review and any associated litigation. Given the Receiver's conclusions, as described in paragraph 91 hereof, the Receiver has, for this Twelfth Report, used a reasonably expeditious (yet still time-consuming) review process and has been conservative in "allocating" expenses to NPL, in an effort to minimize cost and attempt to fairly illustrate NPL's "best case" for consideration by the Manitoba Court. In the event the Manitoba Court finds that claims to the Net Receivership Proceeds are properly to be determined on a separate corporation basis, the Receiver will require an opportunity to undertake a more rigorous process of allocating expenses.
 - (c) the Separate Corporation Analysis includes the estimated Remaining Receivership Expenses. The Separate Corporation Analysis will be affected to the extent that the Remaining Receivership Expenses are more or less than presently estimated;

- (d) approximately \$13.3 million in "corporate overhead" expenses incurred in the course of the Receivership Proceedings are not readily specifically allocable to a particular Debtor. These expenses are primarily comprised of corporate payroll and professional fees. For the purpose of the Separate Corporation Analysis, the Receiver has taken the reasonable and efficient approach of allocating corporate overhead proportionately to the gross proceeds of realization of the respective assets of NIP, NI and NPL. It should be noted that this allocation includes, in part, an allocation of the Receiver's Charge, which charges all Property and ranks in priority to the Lender's Security.

Allocation of Payment of Priority Claims and Court-ordered Charges

95. Certain obligations of the Debtors, including certain amounts due to employees (or to Service Canada in respect of subrogated claims under the WEPP) rank in priority to the Lender's Security. These expenses (presently estimated) have been allocated to NIP, as all of the Canadian Debtors' employees were employed by NIP. Many of these employees undertook work activities for other Debtors, including NPL, and a more rigorous allocation process may determine that some proportion of these costs are fairly and equitably allocable to NPL.
96. The Receiver has allocated the payment of Unpaid Rent secured by the Landlords' Charge equally to each of NIP and NPL, as the Landlords' Charge (which ranked subordinate to the Lenders' Security) was secured against the Property of each of the Debtors.
97. It should be noted that the repayment of the Receiver's Borrowings (totaling \$30,082,000) and, therefore, satisfaction of the Receiver's Borrowing Charge (which charged all Property), is captured within "Corporate Overhead" expenses in the Separate Corporation Analysis, as the Receiver's Borrowings were used to fund receivership expenses included as Disbursements. The Receiver did not allocate Receiver's Borrowings to any particular Debtor and notes that this exercise would not yield a different outcome, as the Receiver's Borrowings were used only for payment of specific expenses and not to accumulate cash.

Allocation Generally

98. Although the Receiver is of the view that the allocation it has made for the purpose of this Twelfth Report is reasonable and appropriate, should the Manitoba Court find that claims are properly to be determined on a separate corporation basis, the Receiver will require an opportunity to undertake a more detailed review to identify, for example, (i) the relationships between employees of NIP and each of the Debtors (including certain of the considerations set out at paragraphs 161 – 164 herein with respect to employees as they relate to consolidation) in order to account for any benefit, direct or indirect, derived by each of the Debtors (in

particular, NI and NPL) to ensure the fair allocation of employee costs and obligations, (ii) the specific corporate overhead expenses to be fairly and equitably allocated against the Debtors (in particular NIP, NI and NPL), and (iii) the extent to which proceeds from the realization of NIP, NI and NPL assets should fairly share the burden of expenses properly allocable to other Debtors for which there are no realizations.

Allocation of Repayment of the Credit Facility

99. The Lenders received a total of approximately \$36.4 million (the “**Lender Debt**”) from the proceeds of realization upon Property over the course of the Receivership Proceedings to satisfy outstanding and accruing obligations under the Credit Facility.
100. Pursuant to the Credit Agreement (as found at Exhibit “D” to the Dean Affidavit):
- (a) each of the US Debtors is a Borrower jointly and severally liable for the due and punctual performance of all Obligations (as defined in the Credit Agreement);
 - (b) each of the Canadian Debtors is an unconditional, joint and several guarantor (“**Guarantor**”, and together the “**Guarantors**”), as primary obligor and not merely as a surety, of the due and punctual performance of all Obligations (as defined in the Credit Agreement); and
 - (c) the Lenders have full recourse against each of the Borrowers and Guarantors for satisfaction of all Obligations, including repayment of amounts advanced under the Credit Agreement. NEL and NPL are limited recourse guarantors and, as such, recourse in respect of NEL and NPL was limited to assets specifically secured to a realized value, after all costs and expenses, including enforcement costs, of USD\$20 million.
101. In the circumstances, and consistent with the Credit Agreement, for the purposes of the Separate Corporation Analysis, the Receiver has allocated the following amounts to repayment of the Lender Debt:
- (a) as a Borrower, all of the remaining Net Receivership Proceeds attributable to proceeds realized from NI assets (after the allocation of expenses, priority payments and court-ordered charges described above) totaling approximately \$8 million, leaving a balance of Lender Debt of approximately \$28.4 to be paid by the Guarantors;

- (b) as a Guarantor, the sum of approximately \$14.2 million (being one-half of the balance of Lender Debt) from Net Receivership Proceeds attributable to proceeds realized from NIP assets, after the allocation of expenses, priority payments and court-ordered charges; and
- (c) as a Guarantor, the sum of approximately \$14.2 million (being one-half of the balance of Lender Debt) from Net Receivership Proceeds attributable to proceeds realized from NPL assets, after the allocation of expenses, priority payments and court-ordered charges. This amount is less than the amount of NPL's limited recourse guarantee.

102. The Receiver considers that its allocation of repayment of the Lender Debt is fair and equitable, given that, pursuant to the Credit Agreement, the Lenders would have no obligation to seek recourse first to either NIP or NPL and would, in fact, have the ability to fully recover the Lender Debt from either, subject only to the limited amount of the NPL guarantee.

Net Receivership Proceeds

103. Based on the assumptions and considerations, and subject to the limitations of the analysis, described above, the Separate Corporate Analysis yields the following results:

- (a) the Net Receivership Proceeds of NIP are estimated to total approximately \$1.4 million and Net Receivership Proceeds of NPL are estimated to total approximately \$8.5 million;
- (b) there are no Net Receivership Proceeds in NI, as the totality of the proceeds realized from the sale of its assets was allocated to expenses, priority claims, court-ordered charges and repayment of Lender Debt; and
- (c) an unequal allocation of the repayment of Lender Debt by which all remaining NIP asset realization proceeds are applied to repayment of Lender Debt would increase the Net Receivership Proceeds of NPL to approximately \$9.9 million (i.e. all remaining Net Receivership Proceeds would be attributable to NPL), however, any resulting increase in equity in NPL would still be ultimately subject to the intercompany obligations of NEL to NIP (and would accrue to NIP).

104. The Receiver considers the allocations forming the basis of the Separate Corporation Analysis, for the purposes aforesaid, to be fair and equitable, and otherwise consistent with the basis on which the Receiver is to exercise its discretion and the principles on which such allocations are to be made. Below is a chart summarizing the Separate Corporation Analysis:

Nygard Group Separate Corporation Analysis (in 000s)					(\$CAD)
Operating Entity	NIP	Inc.	NPL	Corporate OH	Total
1. Compute Net Receipts And Disbursements by Entity					
Cash on Hand - March 18, 2020	73				73
Receipts					
Accounts Receivable, Real Estate and Other Collections	7,071	11,825	28,579	7	47,483
Sales Receipts	43,846	6	-	-	43,852
Total Receipts	50,917	11,831	28,579	7	91,334
Disbursements					
Payroll	(8,118)	(980)	-	(4,647)	(13,745)
Rent	(6,175)	-	-	-	(6,175)
Utilities / Operating Expenses / Other	(2,966)	(256)	(223)	-	(3,446)
Insurance	(312)	(387)	(104)	-	(803)
Postage / Courier / Logistics Providers	(1,128)	(6)	-	-	(1,135)
Asset Protection Services	(89)	(209)	(30)	-	(327)
Chargebacks / Returns / Bank Fees	(502)	(12)	-	(0)	(514)
Consultant Fees	(2,620)	(260)	-	-	(2,880)
Professional Fees	-	-	-	(6,438)	(6,438)
Receivers' Sales Taxes	(0)	-	-	(201)	(201)
Debtors' Sales Taxes	(3,971)	-	-	-	(3,971)
Payment of Landlord Charge	(1,293)	-	(1,293)	-	(2,586)
Total Disbursements	(27,175)	(2,110)	(1,650)	(11,286)	(42,221)
Excess of Receipts over Disbursements	23,815	9,721	26,929	(11,279)	49,187
2. Remaining Receivership Expenses					
Remaining Cash Outflows (estimate only)	-	-	-	(2,000)	(2,000)
Excess of Receipts over Disbursements after Remaining Receivership	23,815	9,721	26,929	(13,279)	47,187
3. Allocation of Corporate Overhead (Note 1)					
Corporate Overhead Allocation	(7,403)	(1,720)	(4,155)	13,279	-
Excess of Receipts over Disbursements after Allocation of Corporate	16,412	8,001	22,774	-	47,187
4. Payments that Rank in Priority to Secured Claims					
Vacation Pay	(720)	-	-	-	(720)
Excess of Receipts over Disbursements after Priority Payments	15,692	8,001	22,774	-	46,467
5. Repayment of Debt by Borrowers					
Nygard Inc. Debt Repayment as Borrower	-	(8,001)	-	-	(8,001)
Excess of Receipts over Disbursements after Repayment of Debt by	15,692	-	22,774	-	38,466
6. Payment of Remaining Debt by Guarantors (Note 2)					
Receiver's Borrowings	-	-	-	30,082	30,082
Distribution to Lenders	(14,192)	-	(14,192)	(30,082)	(58,465)
Excess of Receipts over Disbursements after Repayment of Debt by	1,500	-	8,582	-	10,083
7. Payments of Landlord's Charge (Note 3)					
Landlord Charge Payment	(100)	-	(100)	-	(200)
Cash Available for Unsecured Creditors (Note 4)	1,400	-	8,482	-	9,883

Note 1: Allocation of Corporate Overhead (proportionate to gross proceeds)

Allocation of Corporate Overhead <i>(in 000's)</i>	NIP	NI	NPL	Total
Gross Proceeds	50,917	11,831	28,579	91,328
Proration of Gross Proceeds	56%	13%	31%	100%
Corporate Overhead	13,279	13,279	13,279	
Allocation of Corporate Overhead	7,403.40	1,720.26	4,155.42	13,279

Note 2: Payment of Remaining Lender Debt by Guarantors

Debt Repayment Summary <i>(in 000's)</i>	
Total Amount Distributed to Lender	66,466
Repayment of Receiver's Borrowings	(30,082)
Repayment of Lender Debt	36,384
Repayment of Lender Debt by Borrower (NI)	(8,001)
Balance of Lender Debt	28,383
Equal Contribution by NIP/ NPL	14,192

Note 3: Disputed Landlord Claims

The Disputed Landlord Claims have not been adjudicated by the Receiver. Based on the Debtors' books and records, the aggregate amount owing in respect Unpaid Rent for the 14 leases in which landlords filed Notices of Dispute totals approximately \$120,000. The amount included in the above chart (\$200,000) is an estimate of the amounts remaining to be paid, pursuant to the Landlords' Charge, based on the Receiver's preliminary assessment of the Disputed Landlord Claims. The actual amount paid in respect of the Disputed Landlord Claims may, however, differ (and the difference may be material) from the Receiver's preliminary assessment.

Note 4: Cash Available for Unsecured Creditors

On a separate corporations basis, and subject to the qualifications set out above as to the limitations of the allocation process described herein, the Separate Corporation Analysis results in approximately \$1.4 million being available to NIP creditors, and approximately \$8.5 million being available to NPL and its creditors, prior to applying the analysis set out below.

Implications of Intercompany Balances

105. Ultimately, at issue is the extent to which “direct” (as opposed to consolidated) creditors and stakeholders of NIP, NI and NPL (each of the Debtors that had assets) have access to Net Receivership Proceeds and other amounts against which they can attempt to recover debts outstanding to them.
106. Intercompany balances represent either liabilities or assets, affecting the scope of the debts outstanding and the prospects for recovery. Accordingly, to fairly estimate the extent to which the unconsolidated creditors and stakeholders of each of NIP, NI and NPL are to benefit, it is necessary to include, on a separate corporation analysis basis, an assessment of the relevant intercompany balances.
107. In this case, determination of the relevant intercompany balances depends on reliance upon Nygard Group financial records and statements for historical intercompany balances as at the Appointment Date, and the accounting treatment to be applied to advances made by the Lenders and repayments by NIP, NI and NPL, under the Credit Agreement.

Relevant Historical Intercompany Balances

108. As a caution, the Receiver has previously questioned the reliability of the Debtors' books and records as part of the Ninth Reports, and the accounting treatment applied by Nygard Group staff to intercompany transactions.
109. Among others, at paragraph 111 of its Ninth Report, the Receiver commented:

In the Receiver's view, taking into consideration its concerns regarding the reliability of the Debtor's books and records, and the accounting treatment applied by Nygard staff to certain material intercompany transactions, it would be difficult for an independent financial advisor to provide unqualified advice and guidance regarding the Debtors' financial circumstances (either collectively or individually) or endeavour to “separate out” the financial relationships among the complex web of related entities that comprise the Nygard Group and the broader Nygard Organization.

and at paragraph 117 of its Ninth Report, the Receiver commented:

On a general note, it has been described to the Receiver that, because the Nygard Group (and other non-Debtor entities) operated from the perspective of the accounting team as whole rather than individually, the entry of intercompany transactions was, at times, made at the direction of certain employees or executives without regard to the provision of normal accounting rules or usual backup for such entries. This calls into question the intercompany balances generally. In the Receiver's view, if the Nygard Group entities are to be treated separately for creditor

purposes, rather than on a consolidated basis, even a complex accounting review may not be sufficient to properly and fairly sort out intercompany balances.

110. In its Ninth Report at paragraphs 113 and 114, the Receiver described the incorrect accounting treatment applied by the Nygard Group staff to the Credit Agreement advances and, consequently, to the proceeds generated from the sales of the Notre Dame Property and the Toronto Property. The Receiver's opinion regarding the incorrect accounting treatment applied to these transactions by the Nygard Group was endorsed by the Manitoba Court. In his reasons issued November 19, 2020, Mr. Justice Edmond found that:

The Receiver and AGI disagree on the proper accounting treatment of certain assets and liabilities and treatment of intercompany loans within the Nygard Group of Companies. I agree with the analysis provided by the Receiver that it is incorrect to characterize the proceeds generated from NPL property sales as repayment of NIP's debt to the Lenders and result in NIP owing approximately \$17 million to NPL.

...

.... I agree with the Receiver that the correct accounting treatment respecting the proceeds generated from the NPL property sales, namely the Niagara Property and the Notre Dame Property, is an intercompany payable as between one or more of the US Debtors and NPL, and not an intercompany payable between NIP and NPL. (at page T6, lines 27-33 and 38-41 and page T7, lines 1-4)

111. These were material transactions – the Credit Agreement may have been the most material recent Nygard Group financial transaction, both from a business and accounting perspective, and the fact that advances under the Credit Agreement and repayments were improperly accounted for supports the Receiver's concerns as to the reliability generally of the Debtors' books and records. It is also concerning that the accounting treatment applied to these matters appears to reflect a bias to simply recording obligations as obligations of NIP rather than a dedication to accounting rigour.
112. Having stated such a caution, as at the Appointment Date, the Debtors' books and records disclose the following intercompany balances relevant to the Separate Corporation Analysis:
- (a) NPL was indebted to NIP in the amount of approximately \$2.5 million;
 - (b) NEL (100% owner of NPL) was indebted to NIP in the amount of approximately \$18.1 million; and
 - (c) NPL was indebted to 887 (one of the partners of NIP) in the amount of approximately \$200,000.

These amounts generally accord with disclosure made by the Debtors in the Perfection Certificate dated December 30, 2019 provided to the Lenders in connection with the Credit Agreement, and are the basis on which AGI prepared its First Pre-Filing Report dated November 5, 2020 on behalf of NPL. Accordingly, for purposes (as among NIP, NEL and NPL) relevant to the Separate Corporation Analysis, the intercompany balances described in (a), (b) and (c) in this paragraph are used and referenced as the historical intercompany balances.

Accounting Treatment of Credit Agreement Transactions

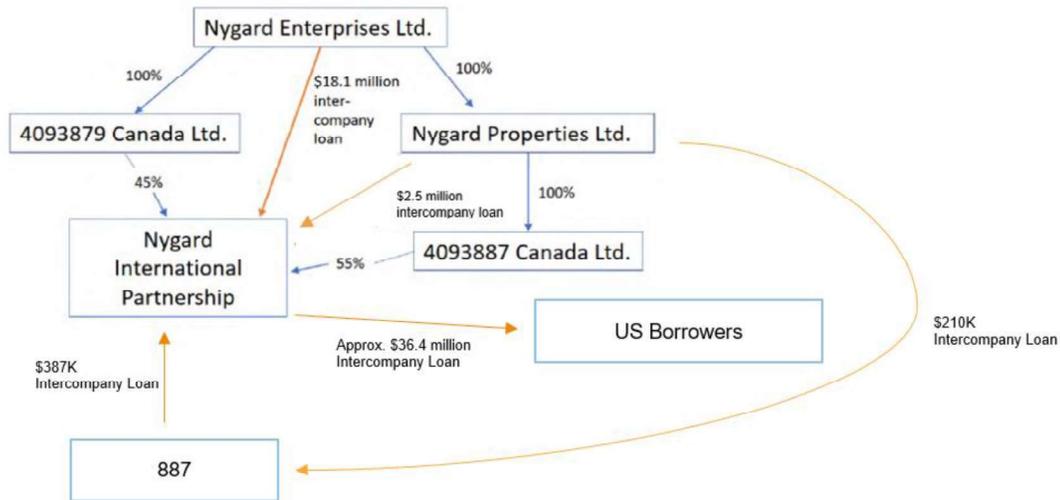
113. NPL previously argued that:

- (a) repayments of Lender Debt from the proceeds of realization of NPL assets should be treated as payments made pursuant to NPL's guarantee, resulting in rights of subrogation in favour of NPL;
- (b) advances made by the Lenders under the Credit Agreement were advances to NIP as a "Borrower"; and
- (c) alternatively, if Credit Agreement advances were made to the US Debtors as Borrowers and were thereafter advanced by them to NIP, repayments of Lender Debt from proceeds realized from NIP assets should be treated as repayment of intercompany obligations to the US Debtors and not as payments made pursuant to NIP's guarantee, such that rights of subrogation did not arise in favour of NIP.

114. The Manitoba Court did not accept NPL's arguments described in subparagraphs 113 (b) and (c) above. In his reasons issued November 19, 2020, Mr. Justice Edmond held that:

NPL is a limited recourse guarantor pursuant to the Credit Agreement. NIP, the entity that carried on the fashion clothing business is also a guarantor pursuant to the Credit Agreement. Both entities may have rights to subrogation to the extent of their payments to the Lenders were made on behalf of the borrowers, as defined in the Credit Agreement. (at page T6, lines 8-13)

115. Accordingly, repayments of Lender Debt from proceeds realized from NPL assets do not affect the historical intercompany debts of NPL to NIP and of NEL to NIP, as alleged in past by NPL, and do not create subrogated rights in favour of NPL as against NIP and its assets. Instead, the correct accounting treatment of Credit Agreement transactions appears to be as follows:
- (a) the Borrowers caused the Lenders to initially advance funds under the Credit Agreement variously to Bank of Montreal, a title insurance provider, various professional firms and NIP, and thereafter on a revolving basis to NIP, to the repay a Bank of Montreal credit facility, pay the costs of the Credit Agreement transaction and fund ongoing expenses. For the purposes of this Separate Corporation Analysis, the Receiver has treated the flow of funds directed by the Borrowers as creating intercompany debts of NIP to the Borrowers collectively in the amount of the Lender Debt (approximately \$36 million);
 - (b) NIP and NPL, as guarantors, made equal payments to the Lenders to repay the balance of the Credit Facility, in the amounts of approximately \$14.2 million;
 - (c) both NIP and NPL are equally subrogated to the rights of the Lenders, as against the Borrowers, in the full amounts of their guarantee payments (calculated by the Receiver to be approximately \$14.2 million each) and are equally subrogated to the rights of the Lender, as against Debtor co-guarantors 4093887 Canada Ltd., 4093879 Canada Ltd. and NEL for equal contributions (in the amounts of approximately \$2.85 million each) to repayment of the Lender Debt attributable to guarantors, resulting in subrogated claims (but not intercompany transactions) accordingly.
116. Based on the equal allocation of the repayment of the remaining Lender Debt to both NIP and NPL, neither NIP nor NPL has subrogated rights as against one another. In addition, the subrogated rights and claims of NIP and NPL as against the Borrowers (i.e. the US Debtors) and other co-guarantors, are illusory, as none of the Borrowers or co-guarantors has assets. Accordingly, while much has been argued in respect of subrogation and rights of guarantors arising under *The Mercantile Law Amendment Act* (Manitoba), there is no practical significance to such rights in this case.
117. Illustrated below is a snapshot of the corporate structure and intercompany obligations among the Canadian Debtors after applying the correct accounting treatment to the funds advanced pursuant to the Credit Facility, including booking an intercompany payable as between NIP and one or more of the US Debtors in respect of the funds advanced pursuant to the Credit Agreement:



The Mercantile Law Amendment Act (Manitoba)

118. In considering the matter of subrogation, the Receiver notes that the Credit Agreement is governed by the law of the State of New York, and the security agreements provided by the Canadian Debtors to the Lenders are generally governed by the law of the Province of Ontario. NPL has argued that, nevertheless, it is *The Mercantile Law Amendment Act (Manitoba)* that governs subrogation issues. For the purposes of this Separate Corporation Analysis, and given that, in the Chapter 15 Proceedings, the US Court has determined that Manitoba is the center of main interest, the Receiver has reached its conclusions on matters of subrogation with reference to *The Mercantile Law Amendment Act (Manitoba)*.
119. Based on advice from TDS, the Receiver understands that, under *The Mercantile Law Amendment Act (Manitoba)*, on payment of a principal obligor's debt to a lender, a surety (or guarantor) becomes subrogated to the rights of the creditor as against the principal obligor ("borrower") and any co-sureties. A guarantor that has paid all or part of a borrower's debt, can recover the full amount of its payment from the borrower, however, where the right to contribution from other co-surety arises, it is limited to contribution by the co-surety to that proportion of the total debt for which the co-surety is "justly liable".
120. With respect to being "justly liable", the general principle is that co-sureties are to contribute equally towards the satisfaction of a guaranteed debt unless there is an agreement between the co-sureties that would supersede such principle. In practice, where a co-surety pays more than its proportionate share of the guaranteed debt, the co-surety is entitled to contribution from the other co-sureties to equalize the amounts paid among the co-sureties. The Receiver further understands that, in circumstances where there are multiple co-sureties, each co-surety's obligation to "contribute" towards the equalization of a co-surety's

disproportionate payment of a guaranteed debt should not exceed its fractional (i.e. number of co-sureties) obligation thereunder.

121. Pursuant to the Credit Agreement, each of the five (5) Canadian Debtors are guarantors (NEL and NPL are limited recourse guarantors) of amounts due by the Borrowers to the Lenders. As such, each guarantor's obligation to "contribute" towards the equalization of a co-guarantor's disproportionate payment of the Lenders claim, should not exceed twenty percent (20%) of the total amount paid by guarantors, and the contributions by NEL and NPL cannot exceed their recourse limit (i.e. USD 20 million plus costs). For example, if, as in this case, the total amount paid by NIP and NPL as Guarantors toward the repayment of the Credit Facility totaled approximately \$14.2 million each, the maximum claim for "contribution", by each of NIP and NPL, against each non-paying guarantor would be 1/5th of that amount, or approximately \$2.85 million.
122. Since the Receiver has fairly allocated the guarantee repayments equally to NIP and NPL, in amounts in excess of their respective "just liability" to other sureties, neither NIP nor NPL can seek contribution from the other under *The Mercantile Amendment Act* (Manitoba). Since none of the remaining borrowers or co-sureties have assets, there are, as a practical matter, no subrogated rights to enforce.
123. The Receiver has noted in past that the Credit Agreement provides that each guarantor guarantees Credit Agreement Obligations "as a primary obligor and not merely as a surety." On the basis of the equal allocation of repayment of the balance of the Lender Debt to NIP and NPL, the designation of NIP and NPL as "primary obligors" does not affect the outcome of the analysis, as both NIP and NPL would have equal rights of recovery against each other if both were treated as primary obligors.

Claims against NPL

124. Based on the assumptions and considerations, and subject to the limitations of the analysis described above, and on the evidence adduced by NPL earlier in these Receivership Proceedings as to its assets, it appears that the only remaining assets of NPL are the Net Receivership Proceeds of NPL totaling approximately \$8.5 million and the Preserved Proceeds (estimated at \$0.6 million) referred to in paragraph 81 of this Twelfth Report, totaling approximately \$9.1 million.
125. As noted above, in general, NPL has argued that it has no third party creditors, however, it is apparent that a significant tax liability has accrued to NPL in respect of the sales of its properties in the course of these proceedings, and other tax liabilities may accrue in relation to dispositions of the NPL Falcon Lake Property and the Fieldstone Property. The Receiver presently estimates those tax liabilities (other than in relation to

the dispositions of the NPL Falcon Lake Property and the Fieldstone Property) to be in the range of approximately \$5 million. NPL may also have other third party creditor obligations.

126. In addition, as discussed above, on the basis of the Debtors' financial information, NPL is indebted to NIP in the amount of approximately \$2.5 million, and NEL, which is NPL's parent corporation, is indebted to NIP in the amount of approximately \$18.1 million.
127. In the result, after repayment of any known NPL "direct" liabilities, any funds remaining in NPL (whether accruing from the sale of Property or arising from other NPL assets) would ultimately be subject to NIP recovering same by means of enforcing the \$18.1 million intercompany debt owing by NEL to NIP.
128. Below is a chart summarizing claims in relation to NPL, NI, NIP and others, indicating that the outcome is that all remaining assets of NPL are either subject to claims of direct creditors of NPL, or subject to the enforcement of NIP's intercompany claim against NEL:

Treatment of Remaining Cash Available for Unsecured Creditors (in 000's)							
	NIP	Inc.	NPL	Corporate OH	NEL	887	Total
Cash Available for Unsecured Creditors in Receiver's Account	1,400	-	8,482	-	-	-	9,883
Preserved Proceeds	-	-	640	-	-	-	640
Recoveries from other NPL Assets	-	-	TBD	-	-	-	-
Total Cash Available for Unsecured Creditors	1,400	-	9,122	-	-	-	10,523
1. Settlement of NPL Liabilities (Note 1)							
NPL Tax Liability (estimate only)	-	-	(4,978)	-	-	-	(4,978)
Settlement of NPL debt owing to NIP	2,462	-	(2,462)	-	-	-	-
Settlement of NPL debt owing to 887	-	-	(210)	-	-	210	-
Settlement of 887 debt owing to NIP	210	-	-	-	-	(210)	-
Other NPL Debts	-	-	TBD	-	-	-	-
Excess of Receipts over Disbursements after Settlement of NPL	4,072	-	1,472	-	-	-	5,545
2. Distribution to NEL by NPL (Note 2)							
NPL Dividend to NEL	-	-	(1,472)	-	1,472	-	-
Partial Settlement NEL debt owing to NIP	1,472	-	-	-	(1,472)	-	-
Cash Available to NIP	5,544	-	-	-	-	-	5,544

Note 1: Settlement of NPL Debts

As noted, based on the Receiver's preliminary assessment, NPL has a tax liability resulting from its real property sales estimated at approximately \$5 million. The Receiver is in the process of assembling and reviewing the information necessary to complete of the Debtors' outstanding tax filings.

As per the Debtors' books and records, NPL owes NIP approximately \$2.5 million. Intercompany loans are also recorded as between NPL and 887 in the amount of approximately \$210,000 and 887 and NIP in the amount of approximately \$387,000. Consequently, upon repayment of NPL's debt to 887, these monies would ultimately accrue to NIP.

The Debtors have previously presented information to the Manitoba Court that, except for Canada Revenue Agency (the “CRA”), NPL has no arm's length creditors. In the Receiver's view (and as described later in this Twelfth Report), NPL historically incurred limited direct obligations, as most (if not all) of its operating expenses were paid by NIP. After the Appointment Date, with NIP no longer able to pay NPL's expenses, NPL has been incurring obligations directly. The Receiver's purpose in entering into the NPL Proceeds Preservation Agreement was to preserve funds for payment of NPL creditor claims, including the claim of NIP, based on the Receiver's view of the intercompany accounts, and more generally for creditors of the “consolidated” Debtors, should a court order that the Debtors be consolidated for creditor payment or bankruptcy purposes (as discussed later in this Twelfth Report).

Note 2. Distribution to NEL by NPL

On the basis of the assumptions and considerations described above in this Twelfth Report, following repayment of the items in Note 1, the remaining funds in NPL would effectively be available to its shareholder, NEL and subject to enforcement by NIP of the debt owing to it by NEL (and certain other minor creditors of NEL).

Based on the above analysis, NPL is estimated to have approximately \$1.5 million remaining after payment of known direct liabilities described in Note 1. Application of these monies to the intercompany amounts owing from NEL to NIP (\$18.1 million) would reduce the obligation owing as between NEL and NIP to approximately \$16.6 million. The additional amounts represented by the Preserved Proceeds would contribute to reduction of NEL's intercompany obligation to NIP, but would be insufficient to fully satisfy that obligation.

129. On a separate corporation basis, NPL may have other obligations to creditors arising from the conduct of the Nygard Group business. For example, vendors regularly performed work or supplied goods for the benefit of NPL and its properties, but contracted directly with NIP in respect of such services. Such vendors, if unpaid, may have claims against NPL in relation to the provision of these goods and services. Further, as more fully described later in this Twelfth Report, the Receiver understands that NIP “employed” various individuals that effectively worked (both full-time and part-time) for NPL to manage and maintain its real property assets, including the Falcon Lake Cottage, the Notre Dame Property, the Broadway Property, the Inkster Property and the Toronto Property. NPL may be jointly responsible for outstanding obligations to such employees, on a “common employer” basis. Further, as noted above, on a more comprehensive allocation review, NPL may be determined to be responsible for a greater proportion of the expenses and disbursements of the Receiver.
130. In consideration of the above, the Receiver is not purporting, by this Separate Corporate Analysis to determine the solvency or insolvency of NPL.

COMMENTS ON CONSOLIDATION ANALYSIS

131. As noted above, claims to the Net Receivership Proceeds depend upon whether claims are to be determined on a stand-alone “separate corporation” basis (discussed above), or on the basis that the Debtors should be substantively consolidated for creditor purposes; that is, that the assets and liabilities of the Debtors should be “pooled” for the purposes of addressing the claims of the combined unsecured creditors of each of the Debtors. Although certain elements of the Separate Corporation Analysis are relevant to consideration of consolidation, once it is determined that the Debtors should be treated as a “single entity” for creditor purposes, intercompany obligations as among the Debtors become irrelevant and all Net Receivership Proceeds would be shared (generally on a pro rata basis) by all creditors of the Nygard Group. As well, any remaining assets of any of the Debtors, including NPL (such as the Preserved Proceeds), would be contributed to the pool of available assets.
132. Consideration of consolidation involves examining the structure, conduct and benefit of the business of the Nygard Group, to consider the extent to which the affairs of the Debtors are entwined and entangled, and to determine whether the Debtors essentially carried on business in common, with the common purpose of maximizing value from the operations of the Nygard Group's business activities, for its ownership.
133. In this regard, based on advice from TDS, it appears that Canadian courts have considered:
- (a) the presence of certain “elements of consolidation” (the “**Elements of Consolidation**”), to be relevant, including (i) difficulty in segregating assets, (ii) presence of consolidated financial statements, (iii) profitability of consolidation at a single location, (iv) commingling of assets and business functions, (v) unity of interest in ownership, (vi) existence of intercorporate loan guarantees, and (vii) transfer of assets without observance of corporate formalities;
 - (b) the relative economic benefits of consolidation to creditors balanced against the prejudice, if any, to particular creditors;
 - (c) whether consolidation is fair and reasonable in the circumstances; and
 - (d) from TDS' review of these matters with Katten, it appears that US courts consider similar principles and elements in respect to consolidation.

The Nygard Group Business

134. The Nygard Group carried on a complex, integrated business involving the design, manufacture (through multiple suppliers), supply and wholesale and retail sales of multiple product lines and fashion brands primarily of women's fashion apparel (the "**Business**").
135. The Debtors' head office was located at the Inkster Property in Winnipeg, Manitoba, and the Debtors maintained corporate offices, with limited functions, at the Toronto Property and in New York, New York (the "**New York Office**"). The Receiver notes that in certain corporate documents, the US Debtors list the New York Office as their corporate head office.
136. In general terms, as earlier reported by the Receiver, three of the Debtors had business functions that contributed materially to, and were integrated into, the Business:
 - (a) NIP operated the Canadian (retail and wholesale) clothing business, at leased locations across Canada and provided centralized administrative services to the Nygard Group (and other members of the broader Nygard Organization). Overwhelmingly, the Business was transacted through NIP;
 - (b) certain elements of the US clothing business (primarily wholesale) were transacted through NI, including certain leases of warehousing facilities through Edson's and Brause, and the lease of certain retail store premises in New York and California; and
 - (c) NPL was the owner of the Inkster Property (used by the Nygard Group for its head office and warehousing), the Toronto Property (used by the Nygard Group for limited corporate functions), the Notre Dame Property (used by the Nygard Group as a warehouse and as Mr. Nygard's personal residence); and the Broadway Property (used by the Nygard Group as a retail location and for certain records storage). It is the Receiver's understanding that Leases (the "**NIP/NPL Leases**") of each of the above properties were entered into between NIP and NPL. Attached hereto as **Appendix "D"** are copies of the Leases relating to the Inkster Property, the Notre Dame Property, the Broadway Property and the Toronto Property. The evidence adduced by the Nygard Group to date in the Receivership Proceedings identifies the NPL Falcon Lake Property and the Fieldstone Property as the only other assets of NPL of value. The NPL Falcon Lake Property appears to have been used by Mr. Nygard as his "summer residence" and for certain Business functions, and the Fieldstone Property appears to have been made available as a residence to Nygard Group employees or other business connections from time to time.

Ownership and Control

137. A corporate chart (the "**Corporate Chart**") detailing the structure of the global Nygard Organization, including the Debtors, is attached hereto as **Appendix "E"**. The Corporate Chart describes that the Canadian Debtors, either indirectly or through a series of holding companies, are 100% privately owned by Mr. Nygard, and that the US Debtors are ultimately held by DGM Financial Services Trustee. Mr. Nygard did not initially dispute his ownership of the US Debtors in the Receivership Proceedings, however, a Limited Objection of Peter J. Nygard dated April 7, 2020 filed in the Chapter 15 Proceedings makes the statement that Mr. Nygard only owns the Canadian Debtors directly or indirectly, and that he has no ownership interest, directly or indirectly, in the US Debtors.
138. No evidence has been adduced on behalf of the Debtors to provide information as to DGM Financial Services Trustee, or Mr. Nygard's relationship, if any, thereto. The Receiver does, however, note the following:
- (a) attached as Exhibit "T" to the Dean Affidavit is an e-mail dated January 3, 2020 from Abraham Rubinfeld, the Nygard Group's general legal counsel, in which in regard to the Credit Agreement transaction (which involves both the Canadian Debtors and the US Debtors), Mr. Rubinfeld states:
- "All parties knew & were fully instructed that MR. NYGARD is the sole owner and ONLY Mr Nygard can approve the deal and subsequently authorize the signing by the "Executive Corporate Officers";
- (b) at paragraph 4 of the Affidavit of Greg Fenske affirmed March 11, 2020, Mr. Fenske states:
- Nygard is a clothing designer, manufacturer, supplier and retailer with its head office in Winnipeg, Manitoba. It has multiple product lines and fashion brands including Peter Nygard Collections, Bianca Nygard, Nygard SLIMS, ALIA, ADX and TanJay. It employs approximately 1450 people worldwide, operates 169 retail stores in North America and supplies other retailers such as Dillards Inc., Costco Wholesale Canada Ltd. and Walmart Canada. The Nygard Group entities, either directly or through a series of holding companies, are 100% privately owned by Peter Nygard;
- (c) attached as Exhibit "A" to the Affidavit of Greg Fenske affirmed November 5, 2020 are certain audited combined financial statements (the "**Combined Financial Statements**") which include the combined accounts of the US Debtors and the Canadian Debtors other than NPL and NEL (the "**Combined Company**"). At page 5 of the Notes to the Combined Financial Statements, it is described that "...the Combined Company had balances and transactions with the following "related parties". The "related parties" include:

- (i) NEL, which is described as the “Company that indirectly controls Nygard International Partnership”;
- (ii) NPL, which is described as a “Company under common control”, and
- (iii) Brause, Edson's, Nygard Holdings Ltd. and Nygard Properties (USA) Ltd., each of which is described in the Corporate Chart as being ultimately owned by DGM Financial Services Trustee, and each of which is described in the Combined Financial Statements as a “Company under common control”;

the implication of all of which is that the Canadian Debtors, and the US Debtors and other entities which are described in the Corporate Chart to be ultimately owned by DGM Financial Services Trustee, are related and under common control;

The Receiver understands that DGM Financial Services is a licensed Barbados Domestic Trust Company which provides various corporate services including incorporation, administration, provision of corporate directors, corporate secretarial services, Registered Office, Resident Agent in Barbados and some other jurisdictions;

- (d) attached hereto as **Appendix “F”** is “Nygard International's” LinkedIn page, which specifically states that the company is controlled by its Founder and Chairman, Peter Nygard;
- (e) Attached hereto as **Appendix “G”** is a copy of Nygard Group Organizational Chart from 2012, which identifies Peter Nygard as the 100% shareholder of all Nygard Group Companies. Based on certain “contribution” agreements, which are attached hereto as Appendix “L” and discussed later in this Twelfth Report, the Receiver understands that Nygard Groups' organizational structure was changed in or about 2012;
- (f) the Receiver has not come across any evidence that prior to the Appointment Date there was any balancing or reconciliation of financial outcomes, management influence or business interests to accommodate, recognize or “reward” separate ownership of entities carrying on the Business. It appears to the Receiver that Mr. Nygard solely ultimately controlled the Business and the benefits thereof.

Directors and Officers

139. As at the Appointment Date, the Canadian Debtors had the following ownership, directorship and executive management structure, reflecting common ownership and generally common directors and officers. As noted in paragraph 137 above, the Corporate Chart identifies Mr. Nygard as the ultimate common owner of the Canadian Debtors:

Canadian Debtor	Shareholders	Directors	Officers
NEL	Peter Nygard	Peter Nygard Tiina Tulikorpi James Bennett	Peter Nygard Tiina Tulikorpi James Bennett
NPL	NEL	Peter Nygard Tiina Tulikorpi James Bennett Denis Lapointe	Peter Nygard Tiina Tulikorpi James Bennett Denis Lapointe
4093879 Canada Ltd	NEL	Peter Nygard Tiina Tulikorpi James Bennett Denis Lapointe	Peter Nygard Tiina Tulikorpi James Bennett Denis Lapointe
4093887 Canada Ltd.	NPL/NEL	Peter Nygard Tiina Tulikorpi James Bennett Denis Lapointe	Peter Nygard Tiina Tulikorpi James Bennett Denis Lapointe
NIP	4093879 Canada Ltd. 4093887 Canada Ltd.	45% partnership interest 55% partnership interest	

140. As at the date of Credit Agreement, the US Debtors had the following ownership, directorship and executive management structure, reflecting generally common directors and executive officers. As noted in paragraph 137 above, the Corporate Chart identifies DGM Financial Services Trustee as the ultimate common owner of the US Debtors:

US Debtor	Shareholders	Directors	Officers
Nygar Inc.	Nygar Holdings (USA) Limited	Greg Fenske James Bennett Tiina Tulikorpi	Greg Fenske Tiina Tulikorpi Angela Dyborn
Nygar Holdings (USA) Limited	NIP Duke Investments Ltd.	Greg Fenske James Bennett Tiina Tulikorpi	Greg Fenske Tiina Tulikorpi James Bennett
Fashion Ventures, Inc.	Nygar Inc.	Greg Fenske James Bennett Tiina Tulikorpi	Greg Fenske Tiina Tulikorpi Angela Dyborn
Nygar NY Retail, LLC	Nygar Inc.	Membership Interest	

141. Attached hereto as **Appendix “H”** are relevant sections of the Omnibus Officer’s Certificate by the US Debtors dated December 30, 2019 and the Officer’s Certificates of each of the Canadian Debtors dated January 2, 2020, which confirm the Officers and Directors of each of the Respondents.
142. Based on certain documentation executed in connection with the Credit Agreement and the Debtors’ evidence in these proceedings, the Receiver understands that all Directors of the Debtors were resident in Canada as at the Appointment Date, more particularly:
- (a) in the Affidavit of Peter Nygard affirmed June 25, 2020, Mr. Nygard states, at paragraph 2, “I have been continuously residing at 1340 Notre Dame, Winnipeg, Manitoba, and have been a permanent resident of Canada in excess of one and one-half years.” ;
 - (b) in “Form 6 Changes Regarding Directors” attached to the Officer’s Certificate of 4093879 Canada Ltd., it is indicated that James Bennett, Tiina Tulikorpi and Denis Lapointe are “Resident Canadian”; and
 - (c) the Receiver understands that Greg Fenske is a resident of Winnipeg, Manitoba.
143. In the conduct of the Business, intercompany agreements appear often to be executed by the same persons on behalf of the Debtors. Two (2) notable examples are:
- (a) the Credit Agreement is executed on behalf of each of the US Debtors, by Greg Fenske, as Vice-President of Nygard Holdings (USA) Limited, and as Chief Executive Officer and President of the other US Debtors, and is executed on behalf of each of the Canadian Debtors by James R. Bennett, as Secretary and Treasurer; and
 - (b) certain of the NIP/NPL Leases are executed on behalf of both NIP and NPL by Denis LaPointe.
144. Mr. Fenske has, in evidence adduced by him in these Receivership Proceedings, described himself as the “Director of Systems for the Nygard Group of Companies”.
145. Mr. Fenske, who appears to have been Vice-President, and/or Chief Executive Officer of each of the US Debtors, states in his Affidavit affirmed September 13, 2020, that he was appointed as Director of each of the Canadian Debtors by shareholder meetings held on September 11, 2020.

Minute Books and Resolutions

146. To the best of the knowledge of the Receiver, the Debtors maintained separate Minute Books, including separate by-laws and resolutions, including preparing and filing required annual resolutions.

Financing and Banking/Cash Management

147. As at the Appointment Date, the Business, and the operations of each of the Debtors, was financed by a single credit facility provided by the Lenders pursuant to the Credit Agreement.
148. As reported in paragraph 100 above, pursuant to the Credit Agreement, each of the Debtors assumed liability for the totality of the Obligations (as defined in the Credit Agreement) under the Credit Agreement, by reason of being either "Borrowers" or "Guarantors" thereunder, subject only to the limited recourse provisions in favour of NPL and NEL.
149. As noted in the First Report and the Dean Affidavit, the Debtors operated a complex cash management system comprised of fifteen accounts that were disclosed by the Nygard Group to the Lenders (two of these accounts were subsequently closed as required by the Credit Agreement). Of the thirteen remaining Nygard Group accounts, eleven were NIP accounts and two accounts were NI accounts (one of which was to be closed). Based on the account descriptions included in the Dean Affidavit, it appears that all Nygard Group retail store receipts and wholesale business receipts in both Canada and the United States of America were all collected in various NIP accounts. NIP maintained several disbursement accounts (both \$CAN and \$USD), while NI maintained one disbursement account to process payroll deductions for employees of NI.
150. Based on the cash management system operated by the Nygard Group, and as reported previously by the Receiver, it appears that the Nygard Group generally operated using only NIP bank accounts. In this regard, it appears that NIP incurred and directly paid all (or substantially all) expenses on behalf of the Nygard Group, regardless of which specific Debtor procured and/or benefited from the goods or services obtained. As detailed further later in this Twelfth Report, these expenses were offset in most but not all circumstances by an intercompany accounting entry so as to maximize outcomes for the Nygard Group generally.
151. In relation to NPL, it appears that, following the receivership, NPL used the bank accounts of 119 to receive and disburse the professional fees owing by NPL funded by Edson's related to the Edson's USD\$237,500 Claim, as NPL did not have a bank account.

152. In connection with the above, during the course of its activities, the Receiver has become aware of an NPL bank account held at The Bank of Nova Scotia (the “**NPL Bank Account**”), which has been largely inactive since 2014 and was closed in early 2020. The last material transactions in the NPL Bank Account occurred between the years 2008 – 2012 and appear to relate to the sale of certain real property as well as the receipt of tax refunds and other collections totaling approximately \$7.6 million. The Receiver notes that generally, as funds were received in the NPL Bank Account, funds were subsequently transferred to NIP (and booked as a repayment of intercompany debt). Approximately \$7.2 million was transferred from NPL to NIP between 2009 and 2012. By 2013, the NPL Bank Account had a balance of approximately \$220,000, which funds were largely depleted through what was usually recorded by the Debtors as “cash advances PJN” and similarly booked (questionably, in the Receiver’s view) as a repayment of debt as between NPL and NIP. The Receiver notes, however, that between 2008 and 2017, the NPL Bank Account was never the primary operating account utilized by NPL (there were 225 entries posted to the NPL Bank Account and 7,900 intercompany transaction posted between NIP and NPL).
153. The Receiver is also aware of certain cash and investment accounts owned by NEL, which the Receiver understands are not the primary operating accounts of NEL.

Assets

154. In general terms:
- (a) NPL owned real estate assets, the majority of which were leased to and used by NIP in the conduct of the Business, including the Inkster Property, the Toronto Property, the Notre Dame Property and the Broadway Property. Based on the realizations by the Receiver on these properties and the evidence adduced in the Receivership Proceedings on behalf of NPL, these properties overwhelmingly represent the value of assets owned by NPL. It appears that other properties of NPL (the NPL Falcon Lake Property and the Fieldstone Property) were also used in connection with the Business or its principals, as Mr. Nygard used the Falcon Lake Cottage as his “summer residence” and the Fieldstone Property was typically made available for use by employees or others connected to the Business;
 - (b) NI owned the inventory, receivables, equipment, vehicles and other minor assets used in connection with the Business (principally wholesale supply) conducted in the US, and leased certain office, retail and warehouse locations in the US; and

- (c) NIP owned the rest of the assets used in connection with the Business and leased all of the office, retail and warehouse locations in Canada.
155. By the manner in which the Business was conducted and payments transacted, NIP regularly incurred costs for the benefit of NPL and NI in relation to their assets, which were captured for accounting purposes (on an inconsistent basis) as intercompany transactions on non-commercial terms that effectively shifted assets among the Nygard Group entities.
156. In relation to the assets of NPL in particular:
- (a) as NPL did not have an “active” bank account and its “rent” from NIP was captured by intercompany entries rather than “cash” payments, NIP funded or directly incurred obligations in relation to NPL properties;
 - (b) NIP advanced funds, or directly incurred obligations, totaling in excess of \$8 million (book value \$8.4 million) for the development, maintenance and other costs associated with buildings and premises at the NPL Falcon Lake Property;
 - (c) NIP advanced funds (or directly incurred obligations) for capital improvements and maintenance costs for each of the Inkster Property and the Notre Dame Property. In this regard, the Debtors have recorded expenditures by NIP totaling approximately \$5.6 million in capital improvements and maintenance costs for the Inkster Property (including roof replacement, new sprinkler systems, and parking lot repairs) and approximately \$1 million in capital improvement and maintenance costs for the Notre Dame Property since 2016 (including roof replacement, new sprinkler systems, and parking lot repairs). Although certain maintenance costs included in the above amounts were properly expensed to NIP, the majority of the above expenses, which appear to have directly benefited and presumably increased the value of NPL property, were booked as direct expenses of NIP (i.e. without booking any intercompany obligation between NPL and NIP). The Receiver notes that the terms of the NIP/NPL Leases provide for the tenant to pay certain capital repair/replacement costs which, in the Receiver’s view, are not typical of commercial leases between arm’s length parties, including in relation to certain structural repairs/replacement;
 - (d) the 2012 Nygard Group Organizational Chart (see Appendix “G”) states that “*Nygart Properties Ltd. is created to receive the leasehold improvements from NIP*”. Although the preceding statement is somewhat ambiguous, in the Receiver’s view, it is apparent that NPL has benefited from certain activities and expenditures incurred by NIP;

- (e) third party service providers, engaged and paid by NIP, regularly performed work for the benefit of NPL but contracted directly with NIP in respect of such services. For example, attached hereto as **Appendix "I"** is a copy of an invoice for the construction of the cabin fireplace at the NPL Falcon Lake Property in the amount of \$1.3 million that was invoiced directly to NIP;
- (f) NPL's books and records include a \$2 million receivable (the "**NBCS Receivable**") due from Nygard Business Consulting (Shanghai) Co. Ltd. ("**NBCS**") as well as an investment of approximately \$3 million in NBCS that, according to the evidence previously presented by the Debtors and AGI to the Manitoba Court, have no realizable value. As noted in the Supplementary Ninth Report, the funds invested in NBCS appear to have been loaned from NIP to NPL (or an affiliate) to NBCS in connection with the 2013 acquisition and improvement of a property in Shanghai (the "**Shanghai Property**"); and
- (g) NPL's books and records include a receivable (the "**Insider Loan**") in the amount of approximately \$0.8 million to a (now former) executive of the Debtors that similarly has been ascribed no recovery value by the Debtors and AGI in their materials previously provided to the Manitoba Court.

Conduct of Business

- 157. The Nygard Group had offices in Toronto, New York, Los Angeles and Shanghai, but the Nygard Groups's operations were based out of the Inkster Property, which was the "nerve centre" for the business. In this regard, substantially all accounting and payment functions, strategic decision making, communications functions, marketing and pricing decisions, new business development initiatives, negotiation of material contracts and leases, retail and third party supplier/services decisions, design and merchandising, and production and distribution functions were managed centrally from the head office at the Inkster Property in Winnipeg, Manitoba.
- 158. In the result, all key administrative functions were performed centrally for the benefit of the Debtors, and, in many cases, for the benefit of other members of the broader Nygard Organization.
- 159. Overwhelmingly, transactions occurring in the course of the Business were transacted (and recorded as having been transacted) through NIP and the Business was conducted using common letterhead (Nygard International), advertisements and marketing materials.

160. Nygard International's LinkedIn page (see Appendix "F") states, *"the company lays claim to complete design, production & distribution facilities in Los Angeles, Toronto & Winnipeg and superb research & design studios worldwide."* The Receiver notes that the Nygard Group commonly presented itself as a single, integrated corporate enterprise led, managed and controlled by Peter Nygard.

Employees

161. As described in the First Report, at the Appointment Date, the Nygard Group employed approximately 1,550 people, 1,450 of which were employed by NIP and 100 of which were employed by NI.

162. While NIP funded the overwhelming majority of employee costs, employees paid by NIP provided services and performed functions for, or which benefited, other Debtors. For example:

- (a) employees of and paid by NIP performed the centralized administrative services described in paragraph 157 above and, generally, employees of NIP carried out all executive and administrative functions of the Debtors;
- (b) while Mr. Fenske, appears to have performed technology functions for all of the Debtors, and executive functions for certain of the Debtors in addition to NIP, it appears that Mr. Fenske was employed and paid only by NIP. In his Affidavit affirmed April 28, 2021, Mr. Fenske states as follows:

Prior to the receivership, I earned a base salary of \$135,000.00 with 3 weeks' holiday (2% per week or \$8,100.00), health benefits (12.5% or \$16,875.00) and a potential annual bonus of \$80,000.00. Therefore, my total potential pay package prior to the receivership proceedings was approximately \$239,975.00.

It has been over a year since I have earned income for the work, as set out above, that I have performed for NPL. As NPL now has access to monies, I require payment for the work I have performed. (at paras 30-31)

This appears to be a consistent approach in regard to many executives and managers who performed functions for other Debtors in addition to NIP;

- (c) in relation to NPL in particular:
- (i) between July 2017 and August 2018 in excess of \$2.6 million in labour expenses directly attributable to the NPL Falcon Lake Property were paid by NIP and booked as intercompany expenses between NIP and NPL;

- (ii) the Receiver understands that NIP employed various individuals that effectively worked (both full-time and part-time) for NPL to manage and maintain its real property assets, including the Notre Dame Property, the Broadway Property, the Inkster Property, the Toronto Property and the Falcon Lake Property;
- (iii) Mr. Mager, in his Affidavit affirmed April 29, 2021 describes work he did at the NPL Falcon Lake Property in the two years preceding the Appointment Date in his role as “director of construction” for NPL. While Mr. Mager stated that he “worked for the one or more of the Debtors for approximately 1 – 2 years prior to the receivership proceedings”, the books and records of the Debtors disclose that Mr. Mager was engaged and paid as an employee of NIP; and
- (iv) an action that was brought before the Manitoba Labour Board against NIP, 887 and 879 by a former NIP employee, for unpaid bonuses (the “**Employee Claim**”) illustrates the manner in which certain employees paid by NIP did significant work for or provided functions and services to NPL. The Receiver understands that the former employee oversaw all construction/property maintenance activities for the Nygard Group (NPL is the only Nygard Group entity with real property assets) and perhaps Mr. Nygard personally. A copy of the Employee Claim (redacted for certain personal information) is attached hereto as **Appendix “J”**.

Key details from the Employee Claim include that the employee was employed by NIP for twenty-seven (27) years and appeared to work principally for NPL in connection with its real property assets or other Nygard Group promotional events/programs that benefited the Nygard Group generally. Additional references are made in the Employee Claim to the significant work undertaken by the employee and other Nygard Group “construction” employees (also employees of NIP) at the NPL Falcon Lake Property and other real estate assets owned by NPL. The Employee Claim also makes certain reference to the involvement of Messrs. Fenske and Bennett (who were also both employed by NIP) in respect of the activities of NPL.

The Receiver understands that the Employee Claim was recently dismissed by the Manitoba Labour Board, for reasons that were not related to the employee's description of the employee's work and services to NPL.

163. Attached hereto as **Appendix “K”** are LinkedIn profiles of two former NIP employees, which illustrates how certain employees described their employment publicly, including:
- (a) Garret Soloway, who is described in the Affidavit of Greg Fenske affirmed September 29, 2020 as “former IT Technical Systems Manager for the Nygard Group of Companies”. Mr. Soloway’s LinkedIn profile describes his experience as “Manager of Infrastructure - NYGARD International”; and
 - (b) Kerwin Raghunanan, who is named as the contact person in NPL’s 2020 tax return attached as Exhibit “C” to the Affidavit of Greg Fenske affirmed November 5, 2020. Mr. Raguhanan’s LinkedIn profile describes his experience as “Tax Manager - NYGARD International”.
164. In the Receiver’s view, the treatment of employees and the services provided by NIP employees to the benefit of other Debtors raise important questions as to whether each of the Canadian Debtors (or some combination thereof) could reasonably be held jointly and severally liable for obligations owing to former “employees” of NIP under the common law doctrine of “common employer”. In this regard, the Receiver understands that there is significant legal precedent for the proposition that, where circumstances warrant, related corporations can be held jointly and severally liable for employment-related compensation (including as relates to notice of termination and severance) even though such related corporations had not directly employed the individual(s) in question.

IT System

165. As described in previous Reports of the Receiver, the IT System is highly integrated and complex. It is a centralized system used commonly by the Debtors and members of the broader Nygard Organization (approximately thirty companies in total) to maintain the books and records of all of them, such that all of the Debtors (and other members of the broader Nygard Organization) had the benefit of the Servers and Programs comprising the IT System, paid for and maintained by NIP, and further had the benefit of the services of the Nygard IT Team, employed by NIP.
166. The Debtors, and other members of the broader Nygard Organization, used “@Nygard.com” as a common email address, and appear typically to have not differentiated among entities in sender descriptions and contact information included in email correspondence.
167. By reason of the centralized IT System and the comingling of data contained thereon, it was necessary for the Manitoba Court to make the DEFA Order, to establish an orderly process for accessing Electronic Records saved therein.

168. The Electronic Records of the Debtors are comingled within the IT System. Based on the evidence adduced by the Nygard Group on behalf of Edson's, Brause and NPL in relation to accessing Electronic Records by means of the DEFA Order, they described that the IT System was such that individual Electronic Records are not readily accessible by means of "key word searches" and that, for the purposes of accessing Electronic Records (including email) of individual Debtors or entities, they required access to the entire IT System, as they could not readily identify where Electronic Records were stored or located on the IT System with respect to each Debtor or entity. In the Receiver's view, the difficulty encountered by certain Debtors and non-Debtor members of the greater Nygard Organization in identifying the locations of what are purported to be separate and distinct records maintained within the IT System, is symptomatic of the extent to which the assets and business operations of the Nygard Group (as well as, in certain instances, other members of the greater Nygard Organization) have been comingled and are entwined.
169. By reason of the centralized IT System and common email server, in responding to the subpoena issued to NI by the SDNY Grand Jury, it was necessary for the Receiver to conduct appropriate reviews of the IT System and Electronic Records generally, as pertinent documents required to be disclosed were comingled within the IT System and not readily available on a "separate corporation" or "Nygard, Inc." basis.

Accounting Practices

170. Consistent with the operation of its common cash management system and its business practice of processing all or substantially all payments/transactions on behalf of the Debtors from NIP disbursement accounts, the Nygard Group maintained only one consolidated accounts payable subledger; that is, all creditors were tracked and managed centrally on one listing regardless of which specific Debtor procured the goods/services.
171. The Business appears to have been managed such that NIP incurred and paid expenses of the Nygard Group, regardless of the purpose of the expense or which Debtor may have benefited from the expense. Expenses were then balanced on intercompany accounts – in some cases, it appears that intercompany entries were made on a consistent basis (e.g. in relation to rent to be attributed to NPL) and in other cases in what appears to have been an "ad hoc" manner, all of which in the view of the Receiver appears to have been calculated to maximize outcomes for the Nygard Group as a whole. It appears to the Receiver that cash rarely changed hands and these intercompany accounts were not settled or paid, as would typically be expected among separate corporations. For example:
- (a) although certain Nygard Group intercompany agreements included administrative and other cost sharing arrangements with NIP, intercompany accounts were not typically adjusted for NIP payroll

costs, the benefits of which were shared by other Debtors. Such a practice was arguably disadvantageous to NIP and its stakeholders, but advantageous to other Debtors;

- (b) intercompany accounts were not consistently adjusted as between NIP and NPL to account for certain of the costs borne by NIP, or funding provided by NIP, for the purposes of NPL's properties, described in paragraph 156 above, to the disadvantage of NIP's stakeholders and to the advantage of NPL's stakeholders.

- 172. With respect to NPL, transactions between NIP and NPL (for example, rent described in the NIP/NPL Leases) were arranged such that cash rarely changed hands between the between NIP and NPL. Rather, such transactions were booked and adjusted as intercompany accounts which would vary month-to-month, but were never completely resolved or paid out.
- 173. Intercompany transactions were material to the conduct of the Business and in relation to the Nygard Groups' cash management. The extent to which the conduct of the businesses and affairs of the Debtors were entwined is evidenced by the fact that, based on the books and records of the Nygard Group, in the five years preceding the Appointment Date, NIP alone recorded in excess of 500,000 intercompany transactions and the aggregate amounts owing (i.e. only considering "receivables") as among Nygard Group entities is greater than \$87 million.
- 174. The Receiver has worked closely with various former members of the Nygard Group accounting team in the course of the Receivership. The Receiver has been advised by certain of these individuals that the Nygard Group (and other non-Debtor entities) operated from the perspective of the accounting team as a common enterprise rather than separate businesses. It was explained to the Receiver that, as such, the entry of intercompany transactions was, at times, made at the direction of certain employees or executives without regard to the provision of normal accounting rules or usual documentary support for such entries as would generally be expected in transactions involving separate and distinct entities.
- 175. The Receiver has expressed in past Reports, and in this Twelfth Report, its concerns with the reliability of the books and records of the Debtors, and their accounting practices. As noted, after reviewing the books and records of the Debtors, it appears to the Receiver that certain material transactions were not booked, or were inaccurate. It appears to the Receiver that the Debtors' general accounting practices were characterized by a lack of diligent observance of the corporate formalities that would be expected in transactions involving separate and distinct entities. The Receiver has been unable to satisfy itself that the transactions detailed in the Debtors' books and records can be relied upon with any real certainty and has concerns about the ability to trace certain transactions.

176. In the Receiver's view, it is difficult to justify the benefits to NIP in funding costly and unrecoverable improvements to the NPL Falcon Lake Property, given that the value of the NPL Falcon Lake Property did not support the expectation that NIP could be repaid. An arm's length transaction for the funding advanced by NIP to NPL in respect of the Falcon Lake Property (in excess of \$8 million), would typically require evidence that the value of the property exceeded the loan value (as noted previously, the Falcon Lake Cottage sold for an aggregate price of \$2.5 million). Further, transactions of a similar nature among arm's length entities would characteristically involve the granting of a security interest in the subject property.
177. Similarly, it is difficult for the Receiver to see the benefits to NIP from its funding of NPL's activities in respect of the NBCS and the Insider Loan or why these transactions were booked by NPL when the source of funds appears to be NIP.

Intercompany Agreements

178. The Receiver has identified a "matrix" listing a series of written agreements (the "**Debtor Intercompany Agreements**") made among certain of the Debtors that, in addition to the NIP/NPL Leases, detail certain arrangements regarding intercompany debts, intercompany service agreements and intercompany cost sharing, among other things.
179. The Receiver has not been able to locate each of the Debtor Intercompany Agreements, however, attached hereto as **Appendix "L"** are copies of:
- (a) the identified "matrix" listing the Debtor Intercompany Agreements;
 - (b) a licensing agreement between NIP and NI for the use of certain brands owned by NIP;
 - (c) a royalty and licensing agreement between NIP and NI for the use of certain brands owned by NI;
 - (d) a services agreement between NIP and NI (which expired on January 31, 2019) for NIP to provide "design services" to NI;
 - (e) contribution agreements impacting NIP (a Debtor) and NHU (a Debtor), Nygard Properties (USA) Limited (a non-debtor), Bridgeport Ltd. (a non-debtor), and Duke Investments Ltd. (a non-debtor) whereby NIP transferred assets to NHU and Nygard Properties (USA) Limited in exchange for preferred shares of each company. The Receiver notes that each company lists the same mailing address (the Inkster Property) and the agreements are signed by the same individual. The Receiver understands that assets were regularly moved between Nygard Group entities, and the

“consideration” normally paid in respect of such transfer of assets generally only included an intercompany accounting entry (and rarely, if ever, any actual exchange of cash as between the companies); and

- (f) an internal tax memo drafted by Doug Bale, the former Director of Tax, states: *“Whereas and from time to time Nygård International Partnership and its Affiliated Companies (including but not limited to Nygård Enterprises Ltd, 4093879 Canada Ltd, 4093887 Canada Ltd, Nygård Properties Ltd, Nygård Holdings Ltd, Nygård Inc, Brause Investments Inc and Edson’s Investment Inc) are required to lend cash between such entities in order to facilitate the day-to-day business requirements of the particular entity...The directors of these affiliated companies hereby acknowledge that any preceding general intercompany lending arrangement are hereby superceded by this Intercompany Loan Agreement”.*

The Receiver has not been able to locate a signed copy of the referenced “Intercompany Loan Agreement”; however, the fact that the Nygard Group noted that these companies are “required to lend cash... to facilitate the day-to-day business requirements” and that new agreements can supersede “any preceding general intercompany lending arrangement” is consistent with the Receiver’s understanding of the Nygard Group operations.

180. From a review of the Debtor’s books and records, it appears that payment terms described in the attached Debtor Intercompany Agreements, were not regularly complied with, as the Debtors rarely settled payment obligations in accordance with the terms of the Debtor Intercompany Agreements (for example, rent as between NIP and NPL was, under the relevant lease, payable monthly via EFT, but these obligations were rarely, if ever, settled in cash).
181. The Receiver further notes that, notwithstanding the evidence adduced in by the Debtors in these Receivership Proceedings that Peter Nygard used various NPL properties (including the Notre Dame Property and the NPL Falcon Lake Property) as personal residences, it does not appear that NPL charged Peter Nygard personally for his use of these properties and the Receiver is unaware of any rental agreements as between NPL and Peter Nygard.
182. In the Receiver’s view, the lack of observance of corporate formalities in the dealings of the Debtors with each other is a principal factor in current state of intercompany accounts. As noted in paragraph 173 above, the Nygard Group has recorded in excess of \$87 million in aggregate intercompany loans as among the Debtors.

Financial Statements

183. Audited financial statements were prepared on a combined basis combining the accounts of the US Debtors and the Canadian Debtors other than NPL and NEL.
184. It appears that NPL filed a separate tax return, a copy of which for the taxation year ended May 31, 2020 (the "**NPL Tax Return**") is attached as Exhibit "C" to the Affidavit of Greg Fenske affirmed November 5, 2020. Among other things, the NPL Tax Return:
- (a) describes the Inkster Property as the head office of NPL;
 - (b) describes the mailing address for NPL as "c/o Tax Department" at the Inkster Property;
 - (c) describes its main revenue-generating business as "Real property leased to related Cdn companies";
 - (d) is certified by Jim Bennett as Vice-Chairman;
 - (e) describes that the accountant that prepared the NPL Tax Return is "connected with the Corporation", although NPL had no Tax Department or accounting employees;
 - (f) describes that NPL is related to or associated with each of the other Debtors (and certain other members of the broader Nygard Organization);
 - (g) describes that it was transmitted by (the Debtor) "4093879 Canada Ltd."; and
 - (h) describes the contact person as Kerwin Raghunanan, who was formerly an employee of NIP.
185. It appears to the Receiver that, while adjustments were made regarding the provision of accounting and related services as among certain of the Nygard Group members and NIP, there was no intercompany adjustment or treatment afforded to the cost of the services provided by NIP to NPL in relation to the preparation of the NPL Tax Return, or, more generally, in connection with accounting services provided by NIP to NPL and other Debtors.

Trade and Other Unsecured Debt

186. As a consequence of the manner in which the Nygard Group conducted its business, only two of the Debtors (NIP and NI):

- (a) employed the employees that conducted business on behalf of entire Nygard Group;
- (b) leased the third-party retail and wholesale premises; and
- (c) contracted for the supply of inventory, and other goods and services

to enable the conduct of the core Nygard Group apparel business. As between NIP and NI, these functions were largely performed by NIP, and NI benefited from NIP's contribution to these functions (including that NIP purchased certain of the inventory sold in the course of NI's retail and wholesale business in the US). In the result, overwhelmingly, the unsecured creditors affected by these proceedings, including former employees, landlords and trade creditors, will have debts owed to them "directly" by NIP notwithstanding that each member of the Nygard Group benefitted, both directly and indirectly, from NIP's (and to a lesser degree, NI's) operations.

187. In the Receiver's view, for example, NIP (and its creditors) have been significantly disadvantaged by NIP's financing of the development of and improvements to the NPL Falcon Lake Property, improvements to the Inkster Property and the Notre Dame Property, the acquisition and build-out of the Shanghai Property, and the Insider Loan.

188. In the circumstances, in the Receiver's view, it is conceivable (and perhaps even likely) that many of the vendors and service providers to the Nygard Group had no appreciation for the "corporate separateness" of the Nygard Group entities.

Summary of Assets, Liabilities and Intercompany Obligations

189. The schedule below (the "**Consolidation Summary**") summarizes the Receiver's estimate of the assets, liabilities and intercompany obligations relevant to the Debtors, on both a stand-alone "separate corporation" basis, and a consolidated basis, based on, among other things, the books and records of the Nygard Group. The Consolidation Summary also describes the differences between the estimated recoveries for unsecured creditors on an unconsolidated versus a consolidated basis:

Summary of Assets, Liabilities and Intercompany Obligations (in \$000's)										
	NIP	NEL	879	887	FV	NI	NHU	NYC	NPL	Consolidated
Assets										
Cash ⁽¹⁾	1,400	-	-	-	-	-	-	-	8,483	9,883
Preserved Proceeds ⁽²⁾	-	-	-	-	-	-	-	-	640	640
Settlement of NPL Liability to NIP	2,462	-	-	-	-	-	-	-	(2,462)	-
Settlement of NPL Liability to 887 ⁽³⁾	210	-	-	-	-	-	-	-	(210)	-
Distribution to NEL by NPL ⁽³⁾	1,472	-	-	-	-	-	-	-	(1,472)	-
Total Assets	5,544	-	-	-	-	-	-	-	4,979	10,523
Arms' Length Liabilities										
Accounts Payable ⁽⁴⁾	(9,611)	-	-	-	-	(50)	-	-	-	(9,661)
Goods in Transit ⁽⁵⁾	(16,038)	-	-	-	-	-	-	-	-	(16,038)
Taxes ⁽⁶⁾	(861)	-	(2,284)	(2,829)	-	(2,100)	(1,076)	-	(4,979)	(14,130)
Unclaimed Gift Cards	(993)	-	-	-	-	(517)	-	-	-	(1,509)
Landlord Claims ⁽⁷⁾	(4,418)	-	-	-	-	-	-	-	-	(4,418)
Employee Claims ⁽⁸⁾	(11,616)	-	-	-	-	(1,721)	-	-	-	(13,337)
Liabilities Excluding Related Party and Intercompany	(43,537)	-	(2,284)	(2,829)	-	(4,388)	(1,076)	-	(4,979)	(59,093)
Related Non-Debtor Liabilities										
Other Related Party Liabilities ⁽⁹⁾	(6,767)	(2)	-	-	-	(11,358)	-	-	-	(18,127)
Other Related Party Liabilities	(6,767)	(2)	-	-	-	(11,358)	-	-	-	(18,127)
Total Liabilities Excluding Intercompany	(50,304)	(2)	(2,284)	(2,829)	-	(15,745)	(1,076)	-	(4,979)	(77,219)
<i>Estimated Consolidated Recovery</i>										<i>14%</i>
Related Debtor Liabilities										
Related Debtor Liabilities (Debtors only) ⁽¹⁰⁾	-	(16,655)	(1,216)	(178)	-	(20,435)	-	(8,396)	-	(46,881)
Intercompany Obligations re Credit Facility	(36,384)	-	-	-	-	-	-	-	-	(36,384)
Related Debtor Liabilities Totals	(36,384)	(16,655)	(1,216)	(178)	-	(20,435)	-	(8,396)	-	(83,265)
Total Liabilities	(86,688)	(16,657)	(3,500)	(3,008)	-	(36,180)	(1,076)	(8,396)	(4,979)	(160,484)
<i>Estimated Non-Consolidated Recovery ⁽¹¹⁾</i>	<i>6%</i>	<i>0%</i>	<i>0%</i>	<i>0%</i>	<i>0%</i>	<i>0%</i>	<i>0%</i>	<i>0%</i>	<i>100%</i>	

Note 1:

The cash figure agrees to the Receiver's analysis shown in paragraph 104 of this Twelfth Report. The Receiver notes that all amounts are estimates only, based on a preliminary allocation of receipts and disbursements as between the Nygard Group entities and, as such, the figures are subject to change.

Note 2:

Based on the assertions of NPL that no other assets of NPL have value, no recoveries have been included in the above analysis in respect of assets recorded in the books and records of NEL and NPL other than the Inkster Property, the Toronto Property, the Notre Dame Property, the Broadway Property and the Preserved Proceeds (resulting from the sales of the NPL Falcon Lake Property and the Fieldstone Property).

Note 3:

For purposes of the above analysis, the Receiver has presumed that the surplus NPL funds, which will ultimately accrue to NIP (as detailed in paragraph 128 of this Twelfth Report) are paid directly to NIP rather than flow through NEL and 887. Estimated recoveries for arm's length creditors are not materially (if at all) impacted by this assumption.

Note 4:

The Nygard Group only operated one consolidated accounts payable subledger (i.e. all creditors were tracked and managed on one central listing), which is consistent with the Nygard Groups' business practice of paying all (or substantially all) expenses of the Nygard Group from an NIP bank account. As such, it is not clear to what extent the amounts due are properly obligations of other Nygard Group entities.

Note 5:

Goods in transit, as at the Appointment Date, were not booked by the Nygard Group to the Debtors' accounts payable subledger. The Receiver has estimated the total value of goods in transit based on Nygard Group purchase orders. Given that most (if not all) expenses for the Nygard Group, including purchases related to its retail business in both Canada and the USA appear to have been paid for by NIP, it is not clear to what extent the amounts due might properly be considered to be obligations of NI.

Note 6:

The tax related liabilities recorded by the Nygard Group are significantly aged and, as such, the current status of (or any unposted adjustments to) the amounts reported as owing is unknown.

As reported previously in this Twelfth Report, the Receiver estimates the tax liability to NPL from the sale of its real property during the Receivership Proceedings at approximately \$5 million. Additional tax liabilities may accrue to NPL in relation to the sale of the NPL Falcon Lake Property and the Fieldstone Property.

Note 7:

The amount for Landlord Claims detailed in the Consolidation Summary is based on an estimate of pre-receivership arrears plus three (3) month's rent, in relation to each Lease. Landlords may claim to be entitled to make larger claims including in relation to damages arising from the repudiation of Leases and/or on other bases.

Note 8:

As noted above, most (if not all) of the former employees of the Canadian Debtors were employed by NIP despite that certain of these employees did work for other Debtors, including NPL.

Note 9:

Notwithstanding the Receiver's concerns regarding the reliability of the Nygard Groups' intercompany accounts, amounts recorded in the Debtors' books and records as being owed by certain of the Debtors to various non-Debtor members of the greater Nygard Organization have been included in the Consolidation Summary at book value.

Note 10:

For purposes of the above analysis, the Receiver has set off the surplus NPL funds totaling approximately \$4.1 million (see Note 3) against the intercompany obligations as between NIP, NPL, NEL and 887. The cumulative adjustments agree to the proposed distributions summarized in the schedule included at paragraph 128 of this Twelfth Report (NPL debt to NIP has been reduced by approximately \$2.4 million, 887 debt to NIP has been reduced by approximately \$0.2 million and NEL debt to NIP has been reduced by approximately \$1.5 million).

Note 11:

The above analysis does not consider that, in a scenario in which the Debtors are treated separately for creditor purposes, distributions by NIP to certain of the Debtors will result in a circular flow of funds (certain Debtors also owe amounts to NIP and other arm's length creditors) whereby a portion of the amounts received by certain Debtors (who would then be in funds to partially pay to its "own" creditors) would be distributable to NIP (effectively restarting the distribution cycle). As noted, consolidating the Debtors for creditor purposes eliminates the difficulties associated with reconciling the Debtors' intercompany transactions (as reported previously in this Twelfth Report, in the five (5) years preceding the Receivership Proceedings, NIP alone reported in excess of 500,000 intercompany transactions).

Court Proceedings

190. A review of court materials filed by the Debtors in regard to the original NOI proceedings and over the course of the Receivership Proceedings discloses a large number of references that are or may be relevant to consideration of whether the Debtors should be treated on a "separate corporation" or consolidated basis for creditor purposes. This review has been updated from the summary to such references that was attached as Appendix "F" to the Ninth Report, to include court materials filed since the preparation of the Ninth Report and to endeavour to include references that directly or indirectly suggest that the Nygard Group was carried on as a "single business" (or appear to "assume" a single business). The updated summary is attached hereto as **Appendix "M"**.

191. The Canadian Debtors took a consolidated approach in relation to the proceedings relating to the Notice of Intention to File a Proposal that were filed in in March 2020 in response to the application seeking the Receivership Order (the “**Original NOI Proceedings**”). The Canadian Debtors reported one consolidated creditor list for the Canadian Debtors (including NPL) totaling approximately \$60.5 million and supplemental creditor lists for each of NIP (to capture third party retail and warehouse lease obligations), 879 and 867 and contemplated a restructuring plan that included the settlement of the collective obligations of the Canadian Debtors through the sale of Nygard Group assets, including the assets of NPL pledged as security to the Lenders pursuant to the Credit Agreement.
192. In the Affidavit of Greg Fenske affirmed March 18, 2020, the following proposal was put forward by Mr. Fenske on behalf of the “Nygard Group of Companies” which included the sale of Nygard Group assets:

Sales of the Toronto buildings at 1 Niagara, the Inkster buildings, the Notre Dame building, and the Broadway building will generate \$25.4 million net dollars. See confidential Affidavit of Greg Fenske for the breakdown on the offers on the buildings and the inventory offer. The general plan is to use the monies from the sale of the buildings to pay \$20 million dollars to White Oak pursuant to their security and to allow the purchasers of the buildings in Manitoba to continue using the buildings in the fashion industry and to potentially retain the employees. Peter Nygard will no longer have any ownership interest in the buildings or the business.

...

The completion of these transactions would represent the culmination of the objectives of the Nygard Group of Companies which would be to pay off the indebtedness to the employees, suppliers and other stakeholders including White Oak Capital and allow these fashion jobs to be retained in Winnipeg.

...

It is my view that the consideration be paid under the Building Sale Agreement is reasonable and fair and is substantially higher than a liquidation value of the Nygard Group of Companies assets in a Bankruptcy or Receivership.

There are very substantial benefits to creditors, employees, suppliers, customers and other stakeholders arising from the completion of the transaction that could not be achieved without selling these assets.

The proceeds from the sale of the building at 1 Niagara will go to White Oak.

The proceeds from the sale of the Manitoba properties when added to the monies received from the sale of 1 Niagara will go to White Oak up to a maximum of \$20,000,000.00.

The proceeds from the sale of the Inventory assets will go to White Oak up to the maximum of the amount owing in excess of \$20,000,000.

The remainder of the monies will go to the Proposal Trustee to make a proposal to pay the remaining creditors.

...

Following the closing of the transaction, the Nygard Group of Companies will no longer be carrying on an active business. The extension of time for the Proposal Trustee to make a proposal is required to enable the Nygard Group of Companies and the Proposal Trustee to conclude the transaction, including any post-closing obligations and to determine whether a revival proposal to the remaining creditors can be made. (at paras 18, 21 and 29-37)

Receiver's General Observations regarding Consolidation

193. While the Nygard Group observed certain separate corporate formalities, it is the Receiver's overall view, based on:

- (a) the Receiver's understandings of the Business and the Nygard Group's historical operations gained during the Receivership Proceedings;
- (b) the manner in which the Business was conducted as described in paragraphs 134 to 188 above, and
- (c) the persistent references included in court materials filed on behalf of the Nygard Group that expressly or impliedly suggest the treatment of the Nygard Group as a single business,

that the affairs of the Debtors are entwined and perhaps irretrievably entangled and that the Nygard Group conducted its affairs in common with a singular purpose of managing and structuring its affairs to maximize the value of (and cash available from) the common enterprise to Mr. Nygard, who, if not formally the owner of each member of the Nygard Group, appears to have exercised general authority and direction over all Debtors and their business affairs, and received the ultimate financial benefits therefrom. To that end, it appears that the "Executive Corporate Officers" were merely figureheads for Mr. Nygard who ultimately required Mr. Nygard's approval as "sole owner" of the Nygard Group.

194. It is further the view of the Receiver that, without the centralized services provided by NIP, none of the other Debtors could have carried on business on a stand-alone basis and that the attempt to distinguish NPL and shield it from the claims of consolidated creditors of the Debtors is an unfair and artificial exercise.

195. As to the "Elements of Consolidation", the Receiver observes as follows:

Difficulty in Segregating Assets

While, for example, legal title to real property assets of NPL and certain assets of NI can be segregated, those assets cannot readily be "segregated" from the substantial investments in those properties and costs thereof being borne by NIP and from the costs incurred by NIP in providing centralized services to NPL and NI (and, in the case of NI, funding certain of the inventory costs which resulted in (e.g.) NI accounts receivable), all

without any cash changing hands or ultimate reconciliation of such contributions, investments and costs, to the benefit of stakeholders of NPL and NI, but to the detriment of stakeholders of NIP.

Presence of Consolidated Financial Statement:

Consolidated financial statements were prepared combining each of the Debtors other than NPL and NEL. In the circumstances described above and in the context of the separate tax return prepared for NPL, the lack of a consolidated financial statement that combines all of the Debtors does not appear to the Receiver to be a material consideration as to whether the Debtors essentially carried on business as common enterprise.

Profitability of Consolidation at a Single Location

The Receiver understands this element to relate to whether the consolidation of business activities (in this case, under NIP in Winnipeg) leads to greater profitability for the group as a whole, as compared to the expected profitability if such services were not centralized and had to be provided by each corporation on an individual basis. It is clear that costs of the centralized services and “consolidated business functions” in this case were reduced as compared to what they would have been if not centralized; that the services for the Nygard Group were intentionally centralized for that purpose and enhanced the profitability of the Nygard Group, while at the same time burdening only one member of the Nygard Group (NIP) with the costs of such services and functions.

Commingling of Assets and Business Functions

There was clearly substantial commingling of assets and business functions by the manner in which the Business was conducted, including commingling of virtually all critical administrative functions.

Unity of Interest in Ownership

The ownership of the members of the Nygard Group is discussed in paragraphs 137 and 138 above. The Receiver has no information relating to DGM Financial Services Trustee, the associated trust, the beneficiaries and management thereof and Mr. Nygard's interest therein at material times. While there may not be formally unity of interest in ownership, Mr. Nygard appears clearly to have exercised general authority and direction over all Debtors and their business affairs.

Existence of Intercorporate Loan Guarantees

The Credit Facility was the only third party financing in connection with the Business, and it effectively financed the "operations" of each of the Debtors. The obligations of the US Debtors, as Borrowers, under the Credit Agreement were guaranteed by each of the Canadian Debtors. The Credit Agreement was structured such that, in effect, each of Debtors had joint and several liability for performance of Obligations arising in connection with the Credit Facility, subject only to the limited recourse to assets of NEL and NPL.

Transfers of Assets without Observance of Corporate Formalities

In the Receiver's view, it is clear that assets, including cash, inventory (purchased by NIP for use in NI's business in the US) and other assets of the Debtors were transferred without substantive observance of corporate formalities. In those cases where, for example, intercompany leases or agreements were entered into, the terms of those leases and agreements were not typically observed, and intercompany transactions were recorded unreliably and without the rigour that would typically be afforded to transactions genuinely between separate corporations to ensure the accurate recording of obligations. The approach taken by the Nygard Group in this regard is consistent with the operation of the Debtors as a common enterprise and, in the Receiver's view, cannot be considered to have involved independent arms' length parties, with independent directors acting in the best interest of their respective corporations.

PREJUDICE ARISING FROM CONSOLIDATION

196. The relative economic benefits of consolidation to creditors balanced against the prejudice, if any, to particular creditors, is relevant to the consideration of substantive consolidation for creditor purposes.
197. The Consolidation Summary discloses that:
 - (a) on the basis of the Separate Corporation Analysis (and the assumptions underlying the Separate Corporation Analysis) and the books and records of the Nygard Group:
 - (i) each of the Debtors other than NPL is insolvent;
 - (ii) NPL may be insolvent, depending upon (A) the outcome of a rigorous allocation of Receivership expenses, which may have the effect of reducing the NPL Net Receivership Proceeds, and (B) the extent of other direct liabilities of NPL which are not known to the Receiver or which have not been determined;

- (iii) if NPL is solvent, unsecured creditors of NPL (principally NIP, for its intercompany debt and CRA) will be paid 100% of their claims, and the balance of any NPL Net Receivership Proceeds and Preserved Proceeds may be subject to enforcement by NIP of the intercompany debt owing to it by NEL;
 - (iv) NI is not entitled to any Net Receivership Proceeds and has no other assets, such that unsecured creditors of NI will not receive any payment;
 - (v) unsecured creditors of NIP (including intercompany debts due to other Debtors and non-Debtor members of the greater Nygard Organization) are estimated to recover approximately 6% of their respective claims; and
 - (vi) unsecured creditors, if any, of the remaining Debtors will not receive any payment;
- (b) on the basis of the consolidation of the Debtors for creditor purposes:
- (i) each of the Debtors is insolvent; and
 - (ii) the “pooled” unsecured creditors of all of the Debtors will be paid approximately 14% of respective claims.

198. In the result, it appears that:

- (a) CRA and perhaps other direct unsecured creditors of NPL, if any, are economically prejudiced by substantive consolidation of the Debtors for creditor purposes; and
- (b) employees, landlords, suppliers and other vendors, gift card purchasers, and taxing authorities who are owed debts by NIP, NI and other Debtors (not including NPL) are economically advantaged by substantive consolidation of the Debtors for creditor purposes.

199. In all the circumstances, given the manner in which the Business was conducted and the benefits derived by the other Debtors (including NPL) from the employees, centralized administrative services and funding provided by NIP, treating the Debtors (in particular, NPL) as separate entities for creditor purposes would result in inequitable treatment for creditors by unfairly depriving creditors of the benefit of pooled assets and resources of the Nygard Group.

200. It is the view of the Receiver that it is fair and reasonable to substantively consolidate the Debtors for the purposes of addressing claims of unsecured creditors, and that the overall benefit to stakeholders arising from such a consolidation outweighs the prejudice to any particular creditors.

IX. BANKRUPTCY CONSIDERATIONS

201. As noted in the Ninth Report, it is common in receivership proceedings that generate proceeds for unsecured creditors for the court to grant the receiver the authority to assign the receivership entities into bankruptcy, thus bringing to bear the provisions of the BIA that are intended to address claims of unsecured creditors. Proceeds can also be distributed through the receivership with the shell being assigned into bankruptcy.

202. In circumstances where a corporate group has conducted its affairs with extensive comingling of assets and business functions, intercorporate loans, integrated financial systems and guarantees (similar to the Nygard Group), in the absence of substantive consolidation, it can be particularly challenging for a bankruptcy trustee from an insolvency perspective, as distinctions between the assets and liabilities of each respective entity are blurred or distorted. In the result, significant time and expense is required to resolve these issues in the course of the bankruptcy process depleting assets that would otherwise be available to creditors.

203. As examples:

(a) if the Debtors are to be treated separately for creditor purposes, the administration of the separate estates may require the accurate determination of intercompany balances, which would be a very complex matter that would undoubtedly be a time consuming and costly process (if it could be completed at all with any degree of certainty). As noted previously by the Receiver and as noted earlier in this Twelfth Report, there are significant concerns with the reliability of the Nygard Groups' books and records in relation to intercompany transactions. As noted above, to appreciate the magnitude of this issue, in the five years preceding the appointment of the Receiver, NIP alone recorded in excess of 500,000 intercompany transactions and the aggregate amounts owing (i.e. only considering "receivables") as among Nygard Group entities is greater than \$87 million.

(b) as described earlier in this Twelfth Report, the Nygard Group only operated one consolidated accounts payable subledger, which is consistent with the Nygard Groups' business practice of paying all (or substantially all) expenses of the Nygard Group from an NIP bank account. As such, it is not clear to what extent the amounts recorded as obligations of NIP are properly obligations of other Nygard Group entities; and

- (c) as described earlier in this Twelfth Report, most (if not all) of the former employees of the Canadian Debtors were employed by NIP despite that certain of these employees did work for other Debtors, including NPL. If the Debtors are not consolidated, it may be that analysis of the functions and claims of employees is required to ensure that NPL recognizes a share of the obligations owing to such employees.

Bankruptcy Jurisdiction

- 204. In appointing the Receiver as the Foreign Representative of the Debtors in the Chapter 15 Proceedings, the US Court found that “the Canadian Proceeding is pending in Canada, which is where the Debtors have their “center of main interests”...” (see paragraph H of the Order Recognizing Foreign Main Proceeding and Related Relief dated April 23, 2020). Attached as **Appendix “N”** is a copy of the Order Recognizing Foreign Main Proceeding and Related Relief dated April 23, 2020.
- 205. On March 13, 2020, the Manitoba Court held that the proper jurisdiction to hear the Receivership Application and the NOI Proceedings was Winnipeg, Manitoba as the “locality of the debtors” and the “principal place” of the Debtors’ business operations and expressly assumed jurisdiction over proceedings relating to the Debtors.
- 206. In any event, it is the Receiver’s view that the locality of each of the Debtors, that is the principal place where the Debtors, including the US Debtors, resided and/or carried on business, was Winnipeg, Manitoba, based on the following:
 - (a) each of the Debtors’ seat of management was located in Canada. All of the directors of the Debtors were resident in Canada, including Mr. Nygard, who exercised general authority and direction over all Debtors and their business affairs while residing in Manitoba;
 - (b) substantially all of the Debtors’ major business functions, including accounting and payment functions, strategic decision making, communications functions, marketing and pricing decisions, new business development initiatives, negotiation of material contracts and leases, retail and third party supplier/services decisions, design and merchandising, and production and distribution functions were managed centrally from the head office at the Inkster Property in Winnipeg, Manitoba;
 - (c) substantially all of the Debtors’ books and records were located at the head office at the Inkster Property in Winnipeg, Manitoba; and

(d) during the course of the Receivership Proceedings, the Business was operated by the Receiver in accordance with its mandate, which is set out in the Receivership Order made by the Manitoba Court.

207. On a separate corporation basis, each the Debtors, other than FV, has recorded liabilities that amount to more than \$1,000.00 (although FV may have no recorded liabilities, the Receiver notes that FV was a "Borrower" under the Credit Agreement and, accordingly, may be subject to subrogated claims in excess of \$1,000.00).

208. On a separate corporation basis, each of the Debtors other than NPL is insolvent, resides and/or carries on business in Canada, and has committed an act of bankruptcy, and NPL may be determined to be insolvent based on a more rigorous allocation of receivership expenses and on whatever additional third party debt obligations it may have.

209. On a consolidated basis, each of the Debtors would be jointly liable for the Common Liabilities which amount to approximately \$77 million. The Common Assets are not sufficient to enable payment of all the Common Liabilities.

X. RECOMMENDED TREATMENT OF CREDITOR CLAIMS

210. The Receiver recommends that the assets and liabilities of the Debtors be treated as substantively consolidated for creditor purposes, and accordingly requests that the Manitoba Court make orders as described in paragraph 41 of this Twelfth Report.

211. In the event that the Manitoba Court makes an order authorizing the Receiver to file assignments in bankruptcy on behalf of each of the Debtors (including the US Debtors) on a basis that reflects the Common Assets and the Common Liabilities, it is the intention of the Receiver to seek an appropriate recognition order in the Chapter 15 Proceedings.

XI. PROFESSIONAL FEES AND DISBURSEMENTS

212. The fees and disbursements of the Receiver and TDS for the period from March 16, 2020 to April 12, 2020, and the fees and disbursements of Katten from the period March 1, 2020 to March 24, 2020, were approved by the Manitoba Court as part of the General Order.

213. The fees and disbursements of the Receiver and TDS for the period April 13, 2020 to May 17, 2020, and of Katten for the period from March 25, 2020 to May 8, 2020, were approved by the Manitoba Court as part of the Landlord Terms Order.

214. The fees and disbursements of the Receiver for the period May 18, 2020 to June 14, 2020, of TDS for the period from May 18, 2020 to May 31, 2020, and of Katten for the period from May 9, 2020 to May 31, 2020, were approved by the Manitoba Court as part of the Notre Dame Approval and Vesting Order.
215. The fees and disbursements of the Receiver for the period June 15, 2020 to July 26, 2020, and of TDS for the period June 1, 2020 to July 19, 2020, were approved by the Manitoba Court as part of the Niagara Approval and Vesting Order.
216. The fees and disbursements of the Receiver for the period July 27, 2020 to August 30, 2020, and of TDS for the period July 20, 2020 to August 30, 2020, were approved by the Manitoba Court as part of the E/B Settlement Approval Order.
217. The fees and disbursements of the Receiver for the period August 31, 2020 to September 20, 2020, of TDS for the period August 31, 2020 to September 13, 2020, and of Katten for the period from June 1, 2020 to September 18, 2020 were outlined in the Eighth Report and were approved by the Manitoba Court as part of the Broadway Approval and Vesting Order.
218. The fees and disbursements of the Receiver for the period September 21, 2020 to October 25, 2020, of TDS for the period from September 14, 2020 to October 18, 2020 were outlined in the Ninth Report and were approved by the Manitoba Court as part of the Broadway Approval and Vesting Order.
219. The fees and disbursements of the Receiver for the period October 26, 2020 to January 10, 2021, of TDS for the period October 19, 2020 to January 10, 2021, and of Katten for the period from September 19, 2020 to November 31, 2020 were outlined in the Tenth Report and approved by the Manitoba Court as part of the Broadway Approval and Vesting Order.
220. The fees and disbursements of the Receiver for the period January 11, 2021 to February 7, 2021, of TDS for the period January 11, 2021 to February 14, 2021, and of Katten for the period from December 1, 2020 to January 31, 2020 were outlined in the Eleventh Report and approved by the Manitoba Court as part of the Landlords' Charge Claims Procedure Order.
221. Summaries of the accounts of the Receiver for the period February 8, 2021 to May 30, 2021, of TDS for the period from February 15, 2021 to May 23, 2021, and of Katten for the period from February 1, 2021 to March 31, 2021 are attached hereto as **Appendix "O"**. The detailed narratives of such accounts, redacted for confidential matters and/or commercially sensitive information associated with the Receivership Proceedings, are attached hereto as **Appendix "P"**.

222. The Receiver, TDS and Katten have maintained detailed records of their professional time and disbursements incurred in connection with the Receivership Proceedings.
223. In accordance with the Receivership Order, the Receiver has been authorized to periodically pay its fees and disbursements, and those of its counsel, subject to approval by the Manitoba Court.
224. The Receiver's professional fees incurred for services rendered from February 8, 2021 to May 30, 2021 amount to \$366,048.25 plus disbursements in the amount of \$19,608.48 (each excluding applicable taxes).
225. The fees of the Receiver's counsel, TDS, for services rendered from February 15, 2021 to May 23, 2021 total \$268,713.50, plus disbursements in the amount of \$2,726.48 (each excluding applicable taxes).
226. The fees of the Receiver's counsel, Katten, for services rendered from February 1, 2021 to March 31, 2021 total USD\$38,647.00, plus disbursements in the amount of USD\$10,482.00 (each excluding applicable taxes).
227. The Receiver has reviewed the accounts of TDS and Katten and confirms that the services reflected therein have been duly authorized and rendered and that, in the Receiver's opinion, the charges are reasonable.

XII. REQUESTED ORDER

228. In consideration of the foregoing, the Receiver respectfully requests that the Manitoba Court make an Order:
- (a) approving this Twelfth Report and the actions/activities of the Receiver described herein;
 - (b) approving the NPL Proceeds Preservation Agreement;
 - (c) approving the May 15 Interim R&D;
 - (d) declaring that each of the Debtors is jointly liable for the Common Liabilities of each of the other Debtors, and the Debtors are joint debtors in respect to Common Liabilities;
 - (e) declaring that the Common Assets of each of the Debtors shall be treated as "common assets" subject to the Common Liabilities;
 - (f) declaring that, accordingly, the assets and liabilities of the Debtors be substantively consolidated for creditor purposes and for the administration and payment of creditor claims;

- (g) authorizing the Receiver to file assignments in bankruptcy on behalf of each of the Debtors on a basis that reflects the Common Assets and the Common Liabilities, or in the alternative:
 - (i) authorizing the Receiver to file such assignments in bankruptcy on behalf of the Debtors other than NPL and NEL, in the manner described in subparagraph (g) above;
 - (ii) authorizing the Receiver to file in the Manitoba Court applications for bankruptcy orders in relation to NPL and NEL, on a basis that reflects the Common Assets and the Common Liabilities and the substantive consolidation of the estates of the Debtors;
 - (iii) if necessary, lifting the stay of proceedings prescribed by paragraph 12 of the Receivership Order to permit such bankruptcy applications to be made and directing that, for the purposes of such assignments and applications, the locality of the Debtors shall be Winnipeg, Manitoba and requesting that Richter Advisory Group Inc. shall be appointed as Trustee; and
 - (iv) directing Richter, upon its appointment and in its capacity as Trustee in relation to the estates of each of the Debtors in bankruptcy, to make a motion for consolidation of the administration of the estates in bankruptcy of all of the Debtors;
- (n) directing that, following the bankruptcies of the Debtors, Net Receivership Proceeds as same are determined from time to time be paid or transferred by the Receiver to the Trustee for the purposes of the consolidated Debtors' bankrupt estates;
- (o) approving the NPL Proceeds Preservation Agreement; and
- (p) directing that, in accordance with the NPL Proceeds Preservation Agreement, upon the bankruptcy of NPL, LTGLC, pay to the Trustee the remaining Preserved Proceeds for the purposes of the consolidated Debtors' bankrupt estates; and
- (h) approving the fees and disbursements of the Receiver, TDS and Katten in the amounts set out in this Twelfth Report.

All of which is respectfully submitted on this 4th day of June, 2021.

Richter Advisory Group Inc.
in its capacity as Receiver of
**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**
and not in its personal capacity

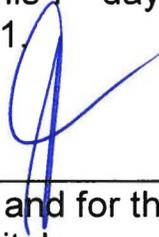


Adam Sherman, MBA, CIRP, LIT



Eric Finley, CPA, CA

This is **Exhibit "C"** referred to in the Affidavit of Greg Fenske Affirmed before me at the City of Winnipeg, in the Province of Manitoba, through the use of Videoconferencing, as permitted by Order under The Emergency Measures Act, this 7th day of September, 2021.



Notary Public in and for the
Province of Manitoba

Liam Valgardson

Subject: FW: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091
Attachments: Questions to Receiver re 12th Report - July 13, 2021 .docx

From: Wayne M. Onchulenko
Sent: Friday, July 16, 2021 8:32 PM
To: Bruce Taylor <GBT@tdslaw.com>
Cc: Fred Tayar <fred@fredtayar.com>; Joe Albert <jalbert@albertgelman.com>
Subject: FW: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091

Hi Bruce

Please pass these questions on to the receiver. We need the answers by the end of the month. Please confirm this is acceptable.

Wayne M Onchulenko*



700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f

Bar Admissions: Manitoba, Ontario and Nunavut

* Services provided through Wayne M. Onchulenko Law Corporation

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Questions for Receiver Respecting Its Twelfth Report

With respect to the chart at paragraph 104, called “Separate Corporation Analysis”:

1.
 - i) under the heading “payroll”, please explain how the \$8.1 million figure was calculated for NIP;
 - ii) why was \$980,000 in payroll allocated to the US entities?
 - iii) why was \$4.647 million in overhead allocated to corporate overheads?
2. A rent payment of \$6.175 million is allocated to NIP and nil to NPL, yet there is an allocation of the Landlord Charge of \$1.293 million to NPL, precisely equal to the amount allocated to NIP. Please explain why NPL is responsible for any of the Landlord Charge, given that it did not pay, and was not obliged to pay, rent as would a tenant?
3. Among the professional fees of \$6.438 million, there is an allocation based on gross proceeds of sale to each of NIP and NPL. Yet the amount of work associated with the sale of NPL’s assets or dealing with NPL would be marginal: payment of hydro and realty taxes and the time spent by the Receiver hiring the brokers and deciding on realty offers and counteroffers in conjunction with the brokers. Please identify from the Receiver’s dockets and those of its counsel which dockets are allocated to (a) NPL and (b) NIP.
4. Of the substantial amount of data and computer hardware that is held by the Receiver, how much is the property or data of NPL?
5. An allocation of \$4.155 million is made for corporate overhead allocation to NPL. That includes a percentage allocation of payroll, rent, postage and courier, bank fees, consultant fees, sales tax and Landlord Charge, all of which should be allocated to the operating business, not to the realty corporation. Do you agree? If not, explain the basis supporting \$4.155 million in corporate overhead allocation for NPL.
6. The borrowings by the Receiver totaled \$30.082 million. How much, if any, of those borrowings were utilized for the benefit of NPL, rather than for the operating entities?
7. In light of the borrowings necessary for the operating business, how does or would the Receiver propose to book the payments to White Oak:
 - i) in the books of the US entities;
 - ii) in the books of NIP; and
 - iii) in the books of NPL?
8. What tax loss was created in NPL when NPL paid White Oak under its guarantee? Explain your answer and please document your assumptions.

9. What impact would a consolidation order have on NPL's tax loss, referred to in the previous question?
10. Provide a sub-schedule that lists separately the fees of the Receiver, TDS and Katten.
11. Provide a sub-schedule that lists separately the fees of KLDDiscovery Inc., in relation to their preparation of the "forensic copy" and for any other consulting work that they have been paid for. Where are their fees reported/grouped in the Receipts and Disbursements statements?
12. Provide a sub-schedule of borrowing interest and fee payments on the Credit Facility that also ties into/reconciles to the Receiver's Borrowings and Distribution to Lenders set out in the Receipts and Disbursements statement.
13. With respect to the \$1,296,202 invoice related to the Falcon Lake Property and referenced at paragraph 156(e) of the 12th Report and attached as Appendix I:
 - i) has the Receiver examined the lease between NPL and NIP to see whether the tenant was responsible to pay for the leasehold improvements? If so, what is the answer?
 - ii) is this invoice accounted for in the intercompany accounts between NIP and NPL?
 - iii) does the Receiver agree that the contract started in 2016 (per the 1st revision reference) and that, as at Jan 27, 2018, \$1,097,339; 84% of the total, had already been invoiced by the contractor?
 - iv) since Ernst & Young provided its audit opinion on the January 31, 2018 financial statements, would the Receiver agree that those financial statements can be relied upon for the purpose of being satisfied that at least \$1,097,339 of the total \$1,296,202 invoice would have been properly accounted for through the intercompany account between NIP and NPL?
14. Provide a list of consultants who have been engaged and paid in relation to the ransomware attack and set out how much was paid to each consultant. Where are their fees reported/grouped in the Receipts and Disbursements statements?
15. Were outside consultants or Richters' IT Group engaged to implement the Cloud Based Solution? If so, how much was paid and where are their fees reported/grouped in the Receipts and Disbursements statements.
16. Provide a summary of any work performed by Richters' IT group. Are their fees set out in the Receiver's accounts? If not, provide the amount paid for fees and show where their fees are reported/grouped in the Receipts and Disbursements statements.

17. Has the source or original entry point of the ransomware attack been determined? If so, please provide details in relation to this. If not, has any attempt been made by Richter or outside consultants to determine the source or original entry point?
18. Has the Receiver considered or established if any consultant may be liable for damages in relation to the ransomware attack, and has the Receiver considered commencing an action against such consultant(s)?
19. Has the Ransomware attack affected the Receiver's ability to provide accurate and detailed Receipts and Disbursements statements?
20. Does the Receiver have a listing of creditors, including names and amounts, by Debtor? If so, please provide that listing.

Notices Issued by Receiver

21. Please provide copies of the notices sent by the Receiver pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, including a list of the addressees.
22. With respect to para. 1 of the Receiver's Report, the Receiver has defined "Property" as including all of the assets of NPL. Please confirm that the Receivership property does not include the Falcon Lake and Fieldstone properties.

Further Questions Regarding Receiver's Twelfth Report

23. With regard to para. 46 (b), with which (a) landlords and (b) suppliers did the Receiver assist? Which members of the Nygard Group was the Receiver assisting?
24. With respect to para. 46 (d), which former employees did the Receiver retain? Produce the independent contractor agreements.
25. With respect to para. 46 (h), which (a) payroll remittances and (b) for which Debtor companies did CRA conduct an audit? Produce the reports of CRA in that regard.
26. With respect to para. 46 (i), in respect of which Debtors was the Department of Finance making a claim? Produce the documentary evidence of such claims.
27. With respect to para. 46 (j), what "conduct" was investigated, and what is the result of such investigation?
28. With respect to para. 46(s), which vehicles were "purportedly transferred"? What is meant by "purportedly"?
29. With respect to para. 48, how did the attacker enter the password-protected servers? Please provide details of (i) damage; (ii) missing data; and (iii) explain what is meant by "functionality ... has been permanently compromised and will not operate in the same fashion". Produce reports received from the Receiver's consultant(s).

30. With respect to para. 52, what “significant challenges [are] faced by the Receiver”?
31. With respect to para. 53, were T4’s issued after the ransomware attack? If yes, produce. Were corporate tax returns filed? If yes, produce them.
32. With respect to para. 69, how does the Receiver have an interest in the proceeds of the disposition of the Falcon Lake and Fieldstone properties “to maximize unsecured creditor recoveries”? Does the Receiver owe a fiduciary duty to NPL? To NEL? To Peter Nygard?
33. With respect to para. 71, what are the “relevant issues”?
34. With respect to para. 75 (a) (iii), what “creditor purposes”? Which creditors?
35. Does the Receiver anticipate income tax recoveries on the basis of losses that have been sustained by some of the Debtors? If yes, which Debtors and what income tax recoveries are anticipated?
36. With respect to para. 86, which dispositions of property are expected to generate net proceeds of \$9.9 million? Please breakdown the proceeds by property.
37. With respect to para. 87, which findings did the Court make which are relevant to the analysis?
38. What makes the analysis on a separate corporation basis complex as stated in para. 89? Has the Receiver failed to maintain records that causes complications to the analysis? Has the Receiver made an analysis? Why not? Detail the analysis for each of subparagraphs (a) – (e).
39. With respect to para. 91 (a) – (d),
 - i) how “meaningful” would the equity in NPL be in each outcome?
 - ii) has the Receiver computed the subrogated claim which NIP has? Ditto re NPL? Please show the Receiver’s calculations.
 - iii) how is it fair to NPL’s creditors, including for example CRA, to consolidate NPL’s assets with NIP’s? On what basis is it reasonable to consolidate? Why is reasonableness relevant to the issue of consolidation?
 - iv) why should Debtors assign into bankruptcy? If there is no consolidation, should NPL assign into bankruptcy? Why?
40. With respect to para. 94 (a), please share the advice which the Receiver received from TDS, including support for such advice.
 - i) with respect to 94 (a)(iii), please advise whether charging receivership expenses associated with liquidating the US Borrowers’ inventory to NPL is fair and equitable, and whether doing so readjusts the priority an NPL

creditor has to NPL assets (by using such NPL assets to pay non-NPL liabilities)?

ii) how did the Receiver calculate Corporate Overhead payroll of \$4.647 million? Please provide back-up schedule therefor.

41. With respect to para. 94 (b), please elaborate on what “a more rigorous process of allocating expenses” consists of?
42. With respect to para. 94 (d), explain why corporate payroll is not allocable to a particular Debtor. Did the Receiver neglect to keep track of payroll liability of each Debtor? Ditto re professional fees? On what basis is the Receiver’s allocation “reasonable”?
43. With respect to para. 96, please explain why the posting of security by NPL to secure the Landlord’s Charge would render NPL liable for the Landlord’s Charge.
44. With respect to para. 97, please elaborate on the Receiver’s allocation. Explain how the allocation to a particular Debtor “would not yield a different outcome”.
45. For the purpose of argument of the pending motion, please undertake the “review” to be done on a “separate corporation basis”.
46. With respect to para. 102, how does the existence of joint and several guarantors (NPI with an unlimited guarantee and NPL with a limited guarantee) lead to the allocation of a 50-50 split between the two guarantors?
47. How does the Receiver book the receipt of the White Oak loan advance(s) in the books of (a) NI and (b) NIP? Also, how does the Receiver’s re-payment to White Oak reflected in (a) the books of NIP and (b) the books of NEL? Why has the Receiver not shown the Excess of Receipts over Disbursements of NIP in line 5 as being also a collection of the accounts receivable due to NI (Inc.) in line 1?
48. With respect to Note 4 on p.37 (¶104), what is the aggregate of the claims of NIP unsecured creditors? What is the aggregate of the claims of NPL unsecured creditors?
49. It is noted that in preparing all twelve of the Receiver’s reports, the Receiver states that it relied on information it derived from the Debtors’ financial records and statements. Has the Receiver found that any such information unreasonable or not internally consistent? If so, please state the information so found, and detail the unreasonableness or inconsistency. Does the Receiver dispute any of the contents of the most recent audited financial statements of Ernst & Young? Does it dispute inter-company balances therein? Please update such balances from the date of the last audited financials until the date of the receivership.
50. With respect to paras. 109-110, the Receiver’s accounting treatment differed from the Debtors because the Court held that the borrowers under the loan agreement were NI, not NIP. The Court relied on the express wording in the loan agreement, notwithstanding that the advances from White Oak went directly to NIP. Correct?

51. With respect to para. 110, was the accounting treatment respecting the sales of Notre Dame and Niagara made by independent contractors of the Receiver under whose supervision they worked, and by whom they were paid? Did the Receiver correct the accounting treatment?
52. With respect to para. 112, does the Receiver accept the inter-company balances reflected there in support of its motion? If not, what does the Receiver say the inter-company balances really are?
53. Are paras. 113-123 argument that the Receiver intended to advance in its brief rather than in its report.
54. The Receiver has waived solicitor-client privilege in para. 119. Please produce the advice received from TDS.
55. With respect to para. 120, does a limited guarantor and an unlimited guarantor owe equal obligations to contribute?
56. With respect to para. 122, on what basis is the Receiver's equal allocation to NIP and NPL "fair" in light of NIP having received the benefit of the White Oak advances?
57. With respect to para. 124, why were Fenske's compensation and the Debtors' professional fees allocated by the Receiver to NPL alone?
58. With respect to para. 125, where has NPL argued that it has no third-party creditors? Was CRA a creditor at the date of Receivership, or did it become a creditor as a result of the post-receivership liquidation? What does Receiver estimate that NPL's payment under its guarantee will generate for it as a tax loss? Is such loss reflected in the para. 128 chart?
59. With respect to Note 1 on p. 45, please particularize what NPL expenses were paid by NIP and quantify them.
60. With respect to para. 129, what other obligations "may" NPL have? Details of quantum. Basis for Receiver's "understanding" of NIP employees working for NIP? Was that reflected in the NIP-NPL inter-company transactions that were booked?
61. With respect to the Consolidation Analysis on p. 46, on what basis is the Receiver entitled to seek a consolidation order for several US and Canadian corporations?
62. What return on the dollar would CRA receive as a creditor of NPL in (a) on a non-consolidated basis; and (b) on a consolidated basis?
63. What return on the dollar would creditors of NI received in (a) on a non-consolidated basis; and (b) on a consolidated basis?
64. What return on the dollar would creditors of NIP received on (a) on a non-consolidated basis; and (b) on a consolidated basis?

65. What legal advice (oral and written) did the Receiver receive and which is referenced in para. 133?
66. What legal advice (oral and written) did the Receiver receive and which is referenced in para. 133 (d)?
67. With respect to para. 147, which operations of (a) NPL; and (b) NEL, were financed by “a single credit facility”?
68. With respect to para. 155, what is meant by “on an inconsistent basis?” Please particularize such transactions. What is meant by “non-commercial terms”? Please document those transactions.
69. With respect to para. 156 (c), which specific terms are not “typical of commercial leases”? Were the NPL – leases to NIP at rental rates that were below what was, at the date of the leases, fair market value?
70. With respect to para. 156 (d), did NIP benefit from certain activities and expenditures incurred by NPL?
71. With respect to para. 156 (e), did the lease terms oblige NIP to pay for improvements to the Falcon Lake property? Did NIP’s staff benefit from such improvements? Were the improvements reflected in the inter-company accounting?
72. With respect to para. 157, is the “nerve centre” for Royal Bank of Canada’s business, Royal Bank Plaza in Toronto? If not, where is it?
73. With respect to para. 159, do some of the businesses operated by Royal Bank of Canada’s entities run using common letterhead, advertisements and marketing materials?
74. With respect to Amazon (worldwide), does it commonly present as an integrated corporate enterprise that until recently was managed by Jeff Bezos?
75. With respect to para. 162, were any expenses incurred or paid by NIP for the benefit of our related entities not captured by inter-company expense transactions? If yes, provide particulars of such transactions.
76. With respect to para. 164, would such employees with a claim against NPL and NIP jointly and severally be prejudiced by a consolidation order (since these employees claims against NPL would be reduced significantly by having to share in NPL’s assets with the creditors of NIP and NI)?
77. With respect to para. 174, details of which individuals so advised the Receiver and what precisely each said. Produce supporting documentation.
78. With respect to para. 175, which material transactions were not booked, or were inaccurate?

79. With respect to para. 176, why does the Receiver need to justify the benefits NIP received to make leasehold improvements several years ago? Does the Receiver know the value of the business generated by NIP's access to and use of the Falcon Lake property?
80. With respect to para. 177, has the Receiver taken any steps to set aside or challenge the transactions referred to therein? Also, has the Receiver determined the benefit which NPL and its creditors and shareholder received, if any, from NPL's guarantee of the Credit Facility the proceeds of which went to NIP?
81. With respect to para. 182, did this "view" of the Receiver preclude Ernst & Young from preparing audited financial statements?
82. With respect to para. 186, what financial benefit did NPL receive from NIP? How is that calculated? Does the Receiver intend to claim against NPL on behalf of NIP? Same questions regarding NEL.
83. With respect to paras. 186-187, does the Receiver know whether NPL could have leased out its properties to arm's length lessees at rates that are higher than NIP's contractual arrangements?
84. With respect to para. 189, does the Receiver agree that NIP's return to creditors on a consolidated basis is 6.5¢ on the dollar compared to 6.4¢ on the dollar on an unconsolidated basis?
- Also, NPL's return to creditors on a consolidated basis is 6.5¢ on the dollar, compared to 100¢ on the dollar on a non-consolidated basis.
85. With respect to para. 191, the Original NOI Proceedings contemplated an NOI for each entity, correct? There was no consolidation sought, correct? No motion was brought to consolidate, correct?
86. With respect to para. 194, is this exercise unfair to NIP, or to some other entity? If to some other entity, how is it unfair? Could NPL have retained a property manager rather than NIP's centralized services? If yes, do you agree that NPL could have carried on business on a stand-alone basis? Ditto for NEL?
87. What duty has the Receiver extended to NPL and its creditors in applying for a consolidation order?
88. With respect to para. 195, (a) whose assets were commingled? (b) did NIP or any other entity guarantee the obligations of NPL to arm's length creditors? and (c) particularize the transfer of assets without "substantive observance of formalities" including:
- i) which assets;
 - ii) date of transfer;
 - iii) names of transferor and transferee; and

iv) consideration for the transfer.

89. With respect to para. 197 (a), are there any “other direct liabilities of NPL which the Receiver knows about”? If not, isn’t that a possibility regarding any corporation in receivership?
90. With respect to para. 197 (b), does the Receiver compare 6% to 14% by ignoring the return to each corporation on the p.65 chart which will receive payment of related party liabilities if there is no consolidation (and therefore those proceeds would be distributed to such related parties’ creditors)? For greater clarity, would a 6% return of related party liability to NIP be in effect a 6% return on \$33 million of such debt?
91. With respect to para. 199, does the Receiver believe that in a non-receivership scenario, the creditors of NIP and NI would be able to pierce the corporate veil of NPL?
92. With respect to para. 201, is the basis for which a Court may permit a bankruptcy assignment by a Receiver to reverse statutory tax priorities and/or to exercise rights of examination under s.163(1) of the BIA? If not, what facts would lead a court to authorize the Receiver to assign?

Questions arising from the Receiver’s Brief:

11(a) the connection between employees of NIP and each of the Debtors in order to account for any benefit, direct or indirect, derived by each of the Debtors (in particular, NIP and NPL) to ensure the fair allocation of employee costs and obligations;

45: Has the Receiver not been approving and paying the wages for all employees throughout the receivership? If that is the case, can the Receiver explain why it would not already know the breakdown of liability for employees of NIP and NPL/NEL? On the basis that it must already know this, explain how this point is relevant to NPL and NEL?

34(b) the presence of intercorporate loans being made back and forth between related companies without the observance of typical corporate formalities;

46: what further corporate formalities does the Receiver believe should have been followed, beyond accounting for such loans and booking them in the intercompany accounts, as was done, and reporting such intercorporate loans in the audited financial statements and the notes to the audited financial statements as was done?

42 (d) all creditors of each of the Debtors were tracked and managed centrally on one consolidated accounts payable sub-ledger, regardless of which Debtor procured or benefited from the goods or services obtained;

47: Is the Receiver aware of any creditors of NPL or NEL that are not accounted for in NPL's and NEL's accounting records and separately disclosed on their respective trial balances? Please detail the creditors' names and claims.

42(e) NIP incurred and directly paid all, or substantially all, expenses on behalf of the Debtors, regardless of which Debtor procured or benefited from the goods or services obtained, which expenses were captured for accounting purposes (on an inconsistent basis) as intercompany transactions on non-commercial terms;

48: What evidence does the Receiver have that this was done on an inconsistent basis or on non-commercial terms? If such evidence is included in the Receiver's 12th report or any other report, please refer to the relevant pages/paragraphs/exhibits. Provide documented examples of such transactions and state whether such transactions with NIP were made with NPL or NEL.

42(g)(i) approximately \$8,000,000.00 for the development and maintenance of the NPL Falcon Lake Property, including approximately \$2,600,000.00 in labour expenses directly attributable to the NPL Falcon Lake Property;

49: Has the Receiver investigated whether the development and maintenance costs were accounted for in the Intercompany accounts and if so, what was the result of that investigation?

42(g)(ii) approximately \$5,600,000.00 in capital improvements and maintenance costs for the Inkster Property;

50: Does the property lease between NIP and NPL provide that the tenant (NIP) is to maintain and repair the property, including paying for leasehold improvements?

42(i) NIP funded the overwhelming majority of employee costs notwithstanding that employees provided services and performed functions for, or which benefited, other Debtors;

51: Which other Debtors? The US Borrowers? Does the Receiver have evidence that such employee costs were for NPL's benefit but not allocated to NPL and NEL through the intercompany accounts? If not, then other than accounting services, what other employee services provided by NIP were for NPL or NEL? The General Ledgers of NPL provided to AGI for 2019 and 2020 indicate total accounting transactions of 800 to 1,600 for each year. Does the Receiver agree that the cost to NIP to account for and post those transactions would be negligible? If not, will the Receiver provide an estimate of what a reasonable cost attributable to NPL would be? Alternatively, does the Receiver agree that a standard property management fee for an outside property manager is in the range of 5% of gross

rental receipts? If so, does the Receiver agree that any amount NIP would fairly allocate NPL for providing the property management services should not exceed 5% of gross revenues or roughly \$50,000?

The General Ledgers of NEL provided to AGI indicate total accounting transactions are in the range of 200 to 500 per year. Does the Receiver agree that the cost to NIP to account for and post those transactions would be negligible? If not, will the Receiver provide an estimate of what a reasonable cost attributable to NEL would be?

42(K) the records of the Debtors are commingled within the IT System;

52: Which Debtors records are commingled? What does the Receiver mean by “commingled”? How is the method by which the records are accounted for within the IT system different from the usual practices of any multi-division or multi-corporate enterprise? How were financial statements and tax returns for NPL prepared year-after-year if the records were commingled?

42 (n) it appears that without the centralized services provided by NIP, none of the other Debtors could have carried on business on a stand-alone basis;

53: What centralized services provided by NIP would have prevented NPL from operating on a stand-alone basis?

42(o) the Canadian Debtors took a consolidated approach in relation to the Original NOI Proceedings

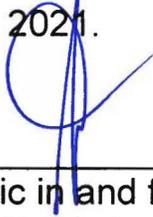
54: Explain in what manner you consider it was a consolidated approach, beyond that for notification purposes to creditors, all creditors were set out on one listing as opposed to separately listed by Debtor. How many NPL creditors were notified? Identify NPL’s creditors.

42(p) throughout the Receivership Proceedings, the Debtors’ own evidence has consistently presented the Debtors and the Business in a manner which “assumes” a common enterprise (e.g. consistently referring to asset of NPL and NIP as “Nygard Group assets” or “Nygard Group Resources”

55: Is the Receiver aware that the Audited Financial Statements are titled “Nygard Group of Companies” and that a description of the operations of the “Nygard Group of Companies” is set out in Note 1 to those financial statements, which note specifically excludes NPL and NEL? In light of that, will the Receiver withdraw that allegation from its brief?

56: Richter Advisory Group Inc. has acted as Receiver for real estate development companies. Would Richter advise whether real estate developers commonly use single-purpose companies for each development? If so, please confirm that accounting/bookkeeping is commonly done at the developer's office for all companies in the group. Please confirm that this common feature of real estate developers does not lead to consolidation of the assets and liabilities of all of the companies in the group. Please also confirm that consolidation in those circumstances may lead to statutory breaches of trust by allowing trades of development A to benefit from the assets of development B.

This is **Exhibit "D"** referred to in the Affidavit of Greg Fenske Affirmed before me at the City of Winnipeg, in the Province of Manitoba, through the use of Videoconferencing, as permitted by Order under The Emergency Measures Act, this 7th day of September, 2021.



Notary Public in and for the Province of Manitoba

Liam Valgardson

Subject: FW: questions

From: Wayne M. Onchulenko
Sent: Wednesday, July 28, 2021 9:10 AM
To: Bruce Taylor <GBT@tdslaw.com>
Cc: Fred Tayar <fred@fredtayar.com>
Subject: questions

Hi Bruce

Do you expect to have the answers to the questions to us by the end of the week?

Wayne M Onchulenko*



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This is **Exhibit "E"** referred to in the Affidavit of Greg Fenske Affirmed before me at the City of Winnipeg, in the Province of Manitoba, through the use of Videoconferencing, as permitted by Order under The Emergency Measures Act, this 7th day of September, 2021.



Notary Public in and for the Province of Manitoba

Liam Valgardson

Subject: FW: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091 [LAW-TDS.FID1853952]
Attachments: Questions to Receiver re 12th Report - July 13, 2021 .docx

From: Bruce Taylor <GBT@tdslaw.com>
Sent: July 30, 2021 10:48 AM
To: Wayne M. Onchulenko <WOnchulenko@lglc.ca>
Cc: Fred Tayar <fred@fredtayar.com>; Joe Albert <jalbert@albertgelman.com>; Ross McFadyen <RAM@tdslaw.com>; Melanie LaBossiere <MML@tdslaw.com>
Subject: RE: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091 [LAW-TDS.FID1853952]

Wayne, we have reviewed with the Receiver the questions you provided with your message below (copy attached) and relevant judicial commentary.

The Receiver acknowledges that, at times, receivers will respond to reasonable stakeholder requests for additional information or clarification. This sometimes includes responding to a list of questions put to them by a stakeholder for the demonstrably valid purpose of clarifying or amplifying material when it is genuinely and truly needed, and do not subject the receiver to harassment.

You have provided 103 “numbered” questions, many with “questions/comments within the questions” – so, perhaps 150 or so questions/comments. Many of the questions are already addressed responsibly in the Twelfth Report, in earlier Reports or in materials which you have filed, or in earlier email correspondence between us. Others are simply argumentative, frivolous or irrelevant. Some can be answered by your own client or by your own review of the law. Some are repetitive, while others, to be answered, effectively require the Receiver to conduct the more detailed allocation exercise that it has referenced in the Twelfth Report.

Perhaps most importantly, responses to these questions are not required to enable NPL to address the key issue in the Net Receivership Proceeds proceedings; that is, that, based on the proper application of the law respecting subrogation as it relates to *The Mercantile Law Amendment Act*, NPL/NEL and their ultimate owner, Mr. Nygard, have no “equity” interest in net receivership proceeds, even on the “best case” which you have asserted for your client. We should add that the same is true in a case where the net proceeds of the Shanghai building sale (of which the Receiver has just learned) are included.

It would be extremely time-consuming and costly for the Receiver to respond to your client’s questions, at the very considerable expense of creditors. It is clear that the laundry list of questions were conceived with no consideration for whether answers to them are genuinely needed to enable your client to address the key issues before the Court in the Net Receivership Proceeds proceedings. In the result, as they presently stand, this questioning process is simply harassing, and the Receiver will not be answering the questions.

We are available to discuss this matter with you further, to determine if there are, in fact, questions the answers to which are genuinely and truly needed in order for the proper purpose of clarifying or amplifying the Receiver’s materials to address the key issues we have described above.

Regards,

G. Bruce Taylor

P 204-934-2566
C 204-295-5241
"he/him"

From: Wayne M. Onchulenko <WOnchulenko@ltglc.ca>
Sent: Friday, July 16, 2021 8:32 PM
To: Bruce Taylor <GBT@tdslaw.com>
Cc: Fred Tayar <fred@fredtayar.com>; Joe Albert <jalbert@albertgelman.com>
Subject: FW: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091

Hi Bruce

Please pass these questions on to the receiver. We need the answers by the end of the month. Please confirm this is acceptable.

Wayne M Onchulenko*



700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f

Bar Admissions: Manitoba, Ontario and Nunavut

* Services provided through Wayne M. Onchulenko Law Corporation

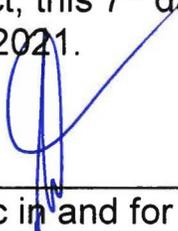
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This is **Exhibit "F"** referred to in the Affidavit of Greg Fenske Affirmed before me at the City of Winnipeg, in the Province of Manitoba, through the use of Videoconferencing, as permitted by Order under The Emergency Measures Act, this 7th day of September, 2021.



Notary Public in and for the Province of Manitoba

FRED TAYAR & ASSOCIATES

PROFESSIONAL CORPORATION
BARRISTERS & SOLICITORS

65 QUEEN STREET W, SUITE 1200
TORONTO, CANADA M5H 2M5

TELEPHONE (416) 363-1800
FACSIMILE (416) 363-3356
fred@fredtayar.com

FILE NO. 20-3091
WRITER'S EXTENSION: 200

August 4, 2021

VIA EMAIL

Mr. G. Bruce Taylor
Thompson Dorfman Sweatman
1700 – 242 Hargrave Street
Winnipeg, MB R3C 0V1

Dear Mr. Taylor:

Re: Peter J. Nygard and Nygard Group of Companies

As you know, I act as co-counsel with Mr. Wayne Onchulenko with respect to the above-noted matter.

Because of the need to act with haste with respect to the pending motion brought by the Receiver and supported by its Twelfth Report dated June 4, 2021, Mr. Onchulenko has asked that I respond to your email dated July 30, 2021.

I am respectfully unable to understand why you commence by stating that we have posed some 150 questions of the Receiver's Report. The Receiver's Report is lengthy and comprehensive, comprising 79 pages exclusive of appendices, and 683 pages if one includes the appendices. Hence, 150 questions is less than 2 questions on each of the 79 pages of the Report.

I was involved in formulating and assembling the questions in respect of the Receiver's Report, an arduous task which I endeavoured to do as succinctly as I could.

I note that you say that you have examined the jurisprudence. You therefore would have come across the decision of Mr. Justice Newbould in the matter of *Re Martellacci* 2014 ONSC 5188 where the court at paragraph 21 stated the following:

“The general practice accepted in Ontario is that if a party has questions regarding a report of such a court officer, those questions should be put to the court officer. Generally in my experience, the court officer will answer the questions fully and any follow-up questions that may arise and cross-examination is not necessary. If there is some good reason to cross-examine the court officer, it can be ordered. I do not agree that a person has a prima facie right at large to cross-examine a court officer such as a trustee and I would not extend the practice in that way. See Farley J. in Bell Canada International at paras. 8 and 9 and his discussion of the limits on cross-examination of a court officer. I agree with his comments.”

Justice Farley in *Re Bell Canada International Inc.* 2003 OJ No. 4738 held as follows:

“As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237 (Ont. Bkcty.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). Bakemates clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.”

My understanding is that the law of Manitoba is consistent with the practice in Ontario with respect to posing questions of the Court-Appointed Receiver.

In your email, you say that “[many] of the questions are already addressed responsibly in the Twelfth Report, in earlier Reports or in materials which you have filed, or in earlier email correspondence between [you and Mr. Onchulenko].” If that is the case, it would be a relatively simple matter for the Receiver to respond to the questions by directing the questioner to where those answers may be found. Respectfully, we do not think that those questions were answered, but even if some were, that would not be the end of the matter inasmuch as we would like the full response of the Receiver to be before the Court on the return of the motion. It would be fair to the Receiver to be given a full opportunity to respond. If a response could be given by simply directing the questioner to a paragraph in a previous Report or material, that would suffice.

I cannot respond to what you suggest are “argumentative, frivolous or irrelevant questions”. I am sorry that you have to characterize the questions in that way. I ask that you specify which questions fall within each of those three categories in order to assist the Court, should it be necessary to move for the right to cross-examine the Receiver on its Report based, in part, on the refusal to answer all questions, or on the basis that certain questions were refused on one of those three bases.

In your email, you also suggest that the responses “are not required to enable NPL to address the key issue in the Net Receivership Proceeds proceedings; that is, that, based on the proper application of the law respecting subrogation as it relates to *The Mercantile Law Amendment Act*, NPL/NEL and their ultimate owner, Mr. Nygard, have no “equity” interest in net receivership proceeds, even on the “best case” which you asserted for your client ...”. We respectfully disagree. We note that in the Twelfth Report commencing at paragraph 27 and continuing for some five pages, the Receiver sets out the “purpose of [its] report”. It is hardly one issue that is before the Court. There are numerous issues that the Receiver is raising in its voluminous Report, and the Receiver is not at liberty to report to the Court on a matter and then decline to answer questions thereon.

I do not propose to engage you in the aspersion that you direct towards the questioner by suggesting that the “laundry list of questions were conceived with no consideration for whether answers to them are genuinely needed ...”. I stated above the considerable time and effort that was expended in formulating the list of questions, which were challenging to compose in writing, rather than in the ordinary *viva voce* way of examining a witness on his or her evidence adduced by way of affidavit.

I am perplexed by you trivializing the questions posed, and yet in the final paragraph of your email, you suggest that you are available to discuss the matter further “to determine if there are ... questions the answers to which are generally and truly needed ...”. All of the questions that have been posed, are needed for the purpose of putting a comprehensive record before the Court to assist the Court in adjudicating upon the outstanding issues.

Would you please let me know whether the Receiver will reconsider its refusal to answer any questions at your early convenience, so that instructions may be obtained from our clients with respect to next steps?

Many thanks.

Yours very truly,

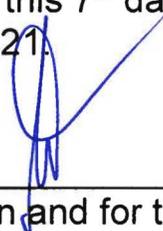
FRED TAYAR & ASSOCIATES
Professional Corporation

Per:

Fred Tayar
/mp

cc: Wayne M. Onchulenko
J. Albert
R. McFadyen
M. LaBossiere

This is **Exhibit "G"** referred to in the
Affidavit of Greg Fenske
Affirmed before me at the City
of Winnipeg, in the Province of
Manitoba, through the use of
Videoconferencing, as permitted
by Order under The Emergency
Measures Act, this 7th day of
September, 2021.



Notary Public in and for the
Province of Manitoba

Liam Valgardson

Subject: FW: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091 [LAW-TDS.FID1853952]
Attachments: Questions to Receiver re 12th Report - July 13, 2021 .docx; Letter to B. Taylor - August 4, 2021.pdf

From: Bruce Taylor <GBT@tdslaw.com>
Sent: Wednesday, August 11, 2021 8:30 AM
To: Fred Tayar <fred@fredtayar.com>
Cc: Wayne M. Onchulenko <WOnchulenko@lglc.ca>; Ross McFadyen <RAM@tdslaw.com>; Melanie LaBossiere <MML@tdslaw.com>
Subject: FW: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091 [LAW-TDS.FID1853952]

Fred, thank you for your August 4, 2021 letter to us (attached) sent in response to our July 30, 2021 message below.

The position of the Receiver remains as described in our message below. Your client is at liberty, of course, to bring this matter (by motion) before Mr. Justice Edmond for his consideration.

Regards,

G. Bruce Taylor
P 204-934-2566
C 204-295-5241
"he/him"

From: Bruce Taylor
Sent: Friday, July 30, 2021 10:48 AM
To: Wayne M. Onchulenko <WOnchulenko@lglc.ca>
Cc: Fred Tayar <fred@fredtayar.com>; Joe Albert <jalbert@albertgelman.com>; Ross McFadyen <RAM@tdslaw.com>; Melanie LaBossiere <MML@tdslaw.com>
Subject: RE: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091 [LAW-TDS.FID1853952]

Wayne, we have reviewed with the Receiver the questions you provided with your message below (copy attached) and relevant judicial commentary.

The Receiver acknowledges that, at times, receivers will respond to reasonable stakeholder requests for additional information or clarification. This sometimes includes responding to a list of questions put to them by a stakeholder for the demonstrably valid purpose of clarifying or amplifying material when it is genuinely and truly needed, and do not subject the receiver to harassment.

You have provided 103 "numbered" questions, many with "questions/comments within the questions" – so, perhaps 150 or so questions/comments. Many of the questions are already addressed responsibly in the Twelfth Report, in earlier Reports or in materials which you have filed, or in earlier email correspondence between us. Others are simply argumentative, frivolous or irrelevant. Some can be answered by your own client or by your own review of the law. Some are repetitive, while others, to be answered, effectively require the Receiver to conduct the more detailed allocation exercise that it has referenced in the Twelfth Report.

Perhaps most importantly, responses to these questions are not required to enable NPL to address the key issue in the Net Receivership Proceeds proceedings; that is, that, based on the proper application of the law respecting subrogation as it relates to *The Mercantile Law Amendment Act*, NPL/NEL and their ultimate owner, Mr. Nygard, have no “equity” interest in net receivership proceeds, even on the “best case” which you have asserted for your client. We should add that the same is true in a case where the net proceeds of the Shanghai building sale (of which the Receiver has just learned) are included.

It would be extremely time-consuming and costly for the Receiver to respond to your client’s questions, at the very considerable expense of creditors. It is clear that the laundry list of questions were conceived with no consideration for whether answers to them are genuinely needed to enable your client to address the key issues before the Court in the Net Receivership Proceeds proceedings. In the result, as they presently stand, this questioning process is simply harassing, and the Receiver will not be answering the questions.

We are available to discuss this matter with you further, to determine if there are, in fact, questions the answers to which are genuinely and truly needed in order for the proper purpose of clarifying or amplifying the Receiver’s materials to address the key issues we have described above.

Regards,

G. Bruce Taylor
P 204-934-2566
C 204-295-5241
“he/him”

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Sent: Friday, July 16, 2021 8:32 PM
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Cc: Fred Tayar <fred@fredtayar.com>; Joe Albert <jalbert@albertgelman.com>
Subject: FW: Peter Nygard and Nygard Group of Companies - Financial Matters | Our File No. 20-3091

Hi Bruce

Please pass these questions on to the receiver. We need the answers by the end of the month. Please confirm this is acceptable.

Wayne M Onchulenko*

Levene  Tadman Golub
Law Corporation

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f

Bar Admissions: Manitoba, Ontario and Nunavut

* Services provided through Wayne M. Onchulenko Law Corporation

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