

**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.  
SECOND SUPPLEMENTARY TWELFTH REPORT OF THE RECEIVER**

**NOVEMBER 30, 2021**

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

**NOVEMBER 30, 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, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC (collectively, 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 together with NEL, NIP, NPL and 879, the “**Canadian Debtors**”) (the US Debtors and the Canadian Debtors together, the “**Nygard 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 will provide 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 permit. 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, 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 (as defined in the First Report (as hereinafter defined)) 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 may 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 (the “**Seventh Report**”).

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.
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.
13. Also, on September 15, 2020, the Manitoba Court made an Order (the “**NOI Withdrawal Order**”) withdrawing the NOI Proceedings (as defined in the NOI Withdrawal Order”) in accordance with the E/B Settlement Agreement.
14. 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.
15. On November 19, 2020, the Manitoba Court made 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**”).

16. 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**”).
17. 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.
18. 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.
19. Subsequent to the making 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.
20. On January 28, 2021, the Manitoba Court made 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**”).
21. On March 3, 2021, the Manitoba Court made 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.
22. On April 16, 2021, the Receiver filed a notice of motion with the Manitoba Court returnable May 12, 2021 (the “**Preservation of Proceeds Motion**”) in respect of the preservation of proceeds realized from the sale of certain real property owned by NPL (the “**Preserved Proceeds**”) in accordance with an agreement (the “**NPL Proceeds Preservation Agreement**”) reached between the Receiver and NPL pending a final determination by the Manitoba Court of certain issues with respect to (i) the state the Debtors’ intercompany accounts, (ii) the respective claims of NPL and NIP (if any) to be subrogated to the security held by the Lenders and the extent and/or amount of such subrogation, (iii) the consolidation of the Debtors for creditor purposes, and (iv) the potential bankruptcy of the Debtors, including NPL (collectively, the “**Consolidation Issues**”). Ultimately, the Receiver and NPL were able to resolve their dispute with respect to the matters which were to be argued at the May 12, 2021 hearing and, as such, the Preservation of Proceeds Motion was adjourned to be heard, if necessary, on June 17, 2021, which date had already been secured to deal with the Consolidation Issues.

23. On June 4, the Receiver filed a notice of motion with the Manitoba Court returnable June 17, 2021 (the “**Net Receivership Proceeds Motion**”) seeking an Order(s), among other things, substantively consolidating the assets and liabilities of the Debtors for the purpose of addressing the claims of creditors of each of the Debtors and authorizing the Receiver to file assignments in bankruptcy in respect of each of the Debtors (including the US Debtors) on a substantially consolidated basis. The Net Receivership Proceeds Motion (and the Preservation of Proceeds Motion, if necessary) were subsequently adjourned to November 5, 2021.
24. On July 26, 2021, the Receiver filed a further notice of motion with the Manitoba Court returnable November 5, 2021 seeking advice and direction from the Manitoba Court with respect to whether the additional uses of the Preserved Proceeds, as requested by the Respondents, are proper and consistent with the terms of the NPL Proceeds Preservation Agreement.
25. On September 8, 2021, the Debtors filed a notice of motion with the Manitoba Court returnable September 16, 2021 (the “**Questions Motion**”) seeking an Order, among other things, compelling certain representatives of the Receiver to attend for cross examination on the Receiver’s Twelfth Report dated June 4, 2021 (the “**Twelfth Report**”) or, in the alternative, directing the Receiver to answer all of the questions (as well as any follow-up questions) (collectively, the “**Questions**”) attached as Schedule “A” to the Questions Motion (in excess of 260 questions). On September 16, 2021, the Manitoba Court provided the Receiver and the Debtors guidance regarding the nature and type of questions properly put to the Receiver (generally, questions related to allocation of receivership expenses or intercompany obligations). The Manitoba Court directed that the Receiver and the Debtors cooperate to identify any questions related to the separate corporation analysis, allocation, and/or intercompany balances which relate to the facts and information relied upon by the Receiver in coming to its conclusions as detailed in the Twelfth Report and which were not already answered in the Twelfth Report or any other previously filed materials.
26. On November 5, 2021, the Manitoba Court made an order approving the NPL Proceeds Preservation Agreement and the distribution of certain amounts of the Preserved Proceeds, adjourned the Net Receivership Proceeds Motion to December 20, 2021, and set deadlines for the Receiver and the Debtors (or any interested party) to file responsive materials. On November 17, 2021, TDS provided the Debtors’ counsel, Levene Tadman Golub Law Corporation and Fred Tayar & Associates (collectively, “**LTGLC**”), with a draft form of approval Order in respect of the NPL Proceeds Preservation Agreement. On November 24, 2021, LTGLC approved the draft form of approval Order in respect of the NPL Proceeds Preservation Agreement. The draft form of approval Order has been circulated to those parties in attendance at the November 5, 2020 hearing for approval as to form.

27. 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>.
28. 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 issued by the Manitoba Court are posted to and available for review at the Receiver’s Website.
29. Copies of the pleadings and other materials filed in the Chapter 15 Proceedings, and the various Orders issued by the US Court are also posted to and available for review at the Receiver’s Website.
30. 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

31. The Receiver has previously filed twelve reports (and, collectively with eight additional supplementary reports, the “**Prior Receiver’s Reports**”) with the Manitoba Court in connection with the Receivership Proceedings. Copies of the Prior Receiver’s Reports are available on the Receiver’s website.
32. The Twelfth Report was filed with the Manitoba Court in support the Net Receivership Proceeds Motion. The Receiver’s Supplementary Twelfth Report dated September 14, 2021 (the “**Supplementary Twelfth Report**”) was filed by the Receiver in response to the Questions Motion.
33. This report (the “**Second Supplementary Twelfth Report**”) is filed by the Receiver to respond to certain matters raised in (i) the Affidavit of Debbie Mackie dated October 29, 2021 (the “**Mackie Affidavit**”), (ii) the Affidavit of Joe Albert dated October 29, 2021 and the report of Albert Gelman Inc. (“**AGI**”) in respect of the Receiver’s Separate Corporation Analysis included at paragraphs 92 – 130 of the Twelfth Report (collectively, the “**AGI Report**”), and (iii) the Motion Brief of the Respondents dated October 29, 2021 (the “**NPL Brief**”) and together with the Mackie Affidavit and the AGI Report, the “**Debtors’ Responding Materials**”) filed on behalf of the Debtors in response to the Twelfth Report and the Net Receivership Proceeds Motion.

## III. TERMS OF REFERENCE

34. In preparing this Second Supplementary 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, 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 the Second Supplementary 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.

35. The Receiver has prepared this Second Supplementary Twelfth Report in its capacity as a Court-appointed officer to provide the Manitoba Court with information in relation to the Net Receivership Proceeds Motion. Parties using this Second Supplementary 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.
36. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Twelfth Report.
37. Unless otherwise noted, all monetary amounts contained in this Second Supplementary Twelfth Report are expressed in Canadian dollars.

#### **IV. NPL TAX LIABILITY**

38. The Receiver is in the process of preparing NPL’s tax returns for the years ended May 31, 2020 and May 31, 2021 and currently estimates NPL’s tax liability to be approximately \$3 million, subject to further analysis and discussion with NPL. An additional tax return for the year ending May 31, 2022 will need to be filed in due course as NPL sold its remaining real property (a residential property which was not Property subject to the Receivership Order) in the current tax year, which may result in additional tax liabilities owing by NPL.

#### **V. RESPONSE TO THE MACKIE AFFIDAVIT**

39. The Mackie Affidavit appears to have been filed to provide the Manitoba Court with the results of the guidance provided by the Manitoba Court to both the Receiver and the Debtors in respect of the Questions Motion (the “**Guidance**”). In this regard, the Mackie Affidavit has appended to it both an email dated October 1, 2021 from LTGLC to TDS attaching a letter (the “**LTGLC Letter**”) including a revised list of questions to be put to the Receiver in respect of the Twelfth Report (the “**Revised Questions**”), as well as an email dated October 13, 2021 from TDS to LTGLC attaching a letter responding to the LTGLC Letter and Revised Questions.
40. In order to provide the Manitoba Court with a full record of the Receiver’s actions/activities following delivery of the Guidance, the Receiver wishes to advise the Manitoba Court that on September 16, 2021, immediately following the hearing of the Questions Motion, TDS initiated communications with LTGLC regarding obtaining

from the Debtors a refined list of questions responsive to the Guidance. A copy of the September 16, 2021 email communications between TDS and LTGLC is attached hereto as **Appendix “A”**. A discussion was held between those parties on September 17, 2021 to further discuss the Questions/Guidance. Pursuant to that discussion, at the request of LTGLC, it was agreed that the Receiver would identify and provide answers to questions that it considered were required to be responded to in accordance with the Guidance, while, concurrently, the Debtors would prepare a revised list of Questions, the answers to which they considered to be required to be responded to in accordance with the Guidance.

41. The Receiver did as requested by LTGLC and, on October 6, 2021 TDS provided to LTGLC a letter (the “**October 6 Questions Response**”) in which TDS, on behalf of the Receiver, provided responses to those of the original set of Questions that were, in the Receiver’s view, consistent with the Guidance. Attached as **Appendix “B”** is a copy of the October 6 Questions Response, which was not included in the Mackie Affidavit or otherwise referenced in the Debtors’ Responding Materials.

## **VI. “WHAT ACTUALLY HAPPENED”**

42. The “allocation” of Receiver’s costs (and, in this case, repayment of the Credit Facility) is intended to recognize that, for example, payment of such costs based on the actual timing of the receipt of receivership proceeds from various assets (in which various stakeholders may have interests) and the actual timing of the payment of receivership expenses (and, in this case, repayment of the Credit Facility and the Landlords’ Charge payments), may be unfairly detrimental to particular stakeholders and not result in an equitable sharing of the burden of such costs among stakeholders. In this context, the Receiver has recommended the allocation described in the Twelfth Report, which includes an allocation of \$14.2 million of proceeds generated from the sale of assets of NPL (the “**NPL Asset Sale Proceeds**”) towards repayment of the Credit Facility as being reasonable, fair and equitable.
43. Without providing any explanation or analysis as to why, (i) the AGI Report is premised on the assertion that “what actually happened” was that approximately \$26.9 million of NPL Asset Sale Proceeds were used to repay the Credit Facility and (ii) the NPL Brief (which does not appear to be consistent with the AGI Report) is premised on the assertion that “what actually happened” was that the entire amount of the NPL Asset Sale Proceeds (approximately \$28.6 million) was used to repay the Credit Facility. The NPL Brief alleges certain “Magic Paragraphs” through which it is alleged that the Receiver has “moved numbers around to build a case against NPL’s rights of subrogation” and further states that the Receiver’s “arbitrary allocation” should be ignored, and the Manitoba Court should “attend to what actually happened”.
44. What actually happened was that none of the NPL Asset Sale Proceeds were used to repay the Credit Facility, and that approximately \$11.9 million of NPL Asset Sale Proceeds were used to repay amounts borrowed by the

Receiver during the course of the Receivership Proceedings (the “**Receiver’s Borrowings**”) pursuant to the Receiver’s Borrowings under the Receiver Term Sheet authorized by the Receivership Order, as more fully described below. The balance of the repayment of the Receiver’s Borrowings was made from proceeds of realization of assets of NIP and NI.

### **The Receivership Order and the Cash Sweep Mechanism**

45. By the Receivership Order, as amended by the General Order, and the Landlord Terms Order, the Manitoba Court ordered that:
- (a) the Debtors’ cash management system (the “**Cash Management System**”) be continued;
  - (b) the Receiver remit to the Lenders any and all proceeds from Property in repayment of amounts outstanding in respect of the Credit Facility;
  - (c) the Receiver be empowered to borrow from the Applicant in accordance with the terms of the Receiver Term Sheet for the purpose of funding the receivership; and
  - (d) repayment of the Receiver’s Borrowings and payment of “COVID-period” obligations to Landlords were secured by fixed and specific charges (the “**Receiver’s Borrowings Charge**” and the “**Landlords’ Charge**”) against the whole of the Property (for clarity, including NPL real property that is included in the Receivership Proceedings).
46. The Receiver Term Sheet, approved by the Manitoba Court, obliged the Receiver to repay Receiver’s Borrowings upon the realization of proceeds from the sale of any Property.
47. Accordingly, the Debtors’ Cash Management System effectively remained in place until such time as, firstly, amounts outstanding under the Credit Facility were repaid and, secondly, Receiver’s Borrowings were repaid.
48. As stated in the Twelfth Report, the Lenders were paid approximately \$36.4 million from the proceeds realized from the sale of the Property to satisfy, in full, the amounts due to the Lenders under the Credit Facility. In addition, the Lenders were also repaid approximately \$30.1 million from the Property sales proceeds to repay, in full, the Receiver’s Borrowings.

## Cash Sweep Mechanism

49. The Debtors' Cash Management System operated generally as follows prior to and following the making of the Receivership Order:
- (a) prior to the Appointment Date, all receipts from Nygard Group business activities were collected into various Nygard Group "collection" bank accounts. Each day, there was an automatic transfer or "cash sweep" of the funds in the collection bank accounts to a Canadian dollar bank account controlled by the Lenders (the "**Cash Sweep Mechanism**"), which were then applied by the Lenders towards repayment of outstanding advances and obligations under the Credit Facility;
  - (b) prior to the Appointment Date, Nygard Group disbursement accounts, payroll accounts or other accounts (primarily NIP bank accounts) were used for outgoing, third-party payments and remittances (such as vendor/employee payments or payments of fees to credit card processors). These disbursement accounts were funded by advances made by the Lenders under the Credit Facility;
  - (c) after the Appointment Date, proceeds from the disposition of Property were deposited to collection accounts and swept daily, and the Receiver's accounts and the Nygard Group disbursement accounts (i.e. the costs of the receivership) were funded by advances made under the Receiver Term Sheet;
  - (d) Property proceeds deposited to the collection accounts and swept to the Lenders were applied firstly to repay the amounts outstanding in respect of the Credit Facility, and thereafter to repay the Receiver's Borrowings, such that, in the result, the actual Property proceeds used to repay the Credit Facility and the Receiver's Borrowings were effectively determined by the timing of the sales of Property and receipt of proceeds from such sales; and
  - (e) the Cash Management System (including the Cash Sweep Mechanism) was terminated on September 4, 2020 in recognition of the status of repayments of both the Credit Facility and the Receiver's Borrowings.
50. The operation of the court-approved Cash Management System and the repayment of the Credit Facility were detailed extensively in the Seventh Report, a copy of which (excluding appendices) has been attached hereto as **Appendix "C"**. Paragraph 41 of the Seventh Report states:

*"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, **proceeds from the Property were distributed to the Lenders subsequent to the Appointment Date on a regular basis as repayment of the Credit Facility, and subsequently as repayment***

**of the Receiver's Borrowings. On or about July 27, 2020, [the amounts outstanding in respect of the Credit Facility], plus accrued interest, w[ere] paid in full.**" (emphasis added)

51. The Seventh Report also includes the following:

(a) at paragraph 43:

*"As noted above, upon closing of the Toronto Property sale, the Receiver used **a portion of the net proceeds** to repay all of the outstanding amounts owing to the Lenders under **the Receiver's Borrowings.**"* (emphasis added)

(b) paragraph 44 describes that, subject to a final reconciliation (including with respect to certain ledger debts):

*"all outstanding amounts owing to the Lenders pursuant to the Credit Agreement or Receiver Term Sheet, other than the Lenders' ongoing legal costs and expenses, **have been repaid, in full.**"* (emphasis added)

(c) Paragraph 45 states, among other things, that the Receiver and Lenders had reached an agreement on the use and treatment of the sale proceeds realized from the Toronto Property and other remaining Property, partly as follows:

*"**the Receiver would withhold a total of \$6.1 million from the net proceeds received from the Toronto Property sale...** The balance of the proceeds from the Toronto Property sale would be remitted to the Lenders **to repay the Receiver's Borrowings.**"* (emphasis added)

(d) at paragraph 46:

*"On September 4, 2020, the Receiver made arrangements to alter the Cash Management System such that all future proceeds from the Property would accumulate in the Receivership Accounts as opposed to being swept to the Lenders."*

52. The \$6.1 million withholding arrangement noted above ended upon the approval and subsequent implementation of the E/B Settlement Agreement, as approved by the Manitoba Court in the E/B Settlement Approval Order.

53. As the amounts outstanding in respect of the Credit Facility were effectively repaid on or about July 27, 2020 and there were no realizations from the NPL properties subject to the Receivership Order (as amended) until July 31, 2020 (from the sale of the Notre Dame Property), it should be clear to all parties that, based entirely on the timing of receipts from the sale of the Property, no NPL Asset Sale Proceeds were actually used to repay the Credit

Facility and only a portion of NPL Asset Sale Proceeds were used to repay the Receiver's Borrowings. Below is a schedule summarizing the timing and amounts realized from the sale of the NPL property subject to the Receivership Order (as amended) as well as the timing and amount of the NPL Asset Sale Proceeds paid to the Lenders, which describes that, on the basis of "what actually happened", no NPL Asset Sale Proceeds were used to repay the amounts outstanding in respect of the Credit Facility and that NPL Asset Sale Proceeds in the amount of approximately \$11.9 million were used towards repayment of the Receiver's Borrowings:

Property	Sale Date	Net Proceeds	Date Remitted to the Lenders	Amount Remitted to the Lenders
\$ 000,000s				
Notre Dame Property	31-Jul-20	\$ 2.59	19-Aug-20	\$ 2.59
Niagara Property	28-Aug-20	\$ 16.83	2-Sep-20	\$ 9.26
Inkster Property	18-Feb-21	\$ 7.23	N/A	\$ -
Broadway Property	26-Feb-21	\$ 1.93	N/A	\$ -
		<u>\$ 28.58</u>		<u>\$ 11.85</u>

54. As a result of timing, any NPL Asset Sale Proceeds which were not used toward the repayment of the Receiver's Borrowings were used, in part, to pay receivership expenses and Landlords' Charge payments and the remaining balance is held as part of the balance of funds in the Receiver's bank account (which totaled approximately \$12.8 million as described in the May 15 Interim R&D included in the Twelfth Report).
55. Accordingly, the allegations contained in the Debtors' Responding Materials (i) that all of the NPL Asset Sale Proceeds were used to repay the amounts outstanding in respect of the Credit Facility, (ii) that the Receiver has chosen to apply an "arbitrary allocation", (iii) that the Receiver has "simply moved numbers around to build a case against NPL's right of subrogation" (iv) that the Receiver has never provided the Court or the Respondents details of the remittances to the Lenders and (v) that the Receiver has, as stated in the NPL Brief, "manifestly *chosen* not to reveal those details" to prefer a certain outcome in these Receivership Proceedings, are simply not correct.
56. Prior to filing the Debtors' Responding Materials, the Debtors had before them the detailed analysis of "what actually happened" contained in the Seventh Report and, in fact, the October 6 Questions Response of the Receiver (which the Debtors did not disclose in the Debtors' Responding Materials) specifically directed the attention of the Debtors to paragraphs 37 – 44 of the Seventh Report in response to a question posed by the Debtors specifically requesting information reconciling the repayment of the Credit Facility and Receiver's Borrowings and the distributions to the Lenders as follows:

**Question 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.

**Answer:** see paragraphs 37 to 44 of the Seventh Report of the Receiver dated September 10, 2020 (the "Seventh Report"). The amounts noted therein are in USD. There is some additional interest / fees / foreign exchange / "Ledger Debt" that would factor into a dollar-for-dollar reconciliation; however, the balances are materially the same and have been reported (and approved) by the Court.

Gross repayments noted in paragraph 104 (Note 2) of the Twelfth Report are \$36,384,000 which reconciles to the approximately \$36,000,000 (CAD) noted in paragraph 37 of the Seventh Report.

57. In addition, the Debtors, AGI and counsel to the Debtors were actively engaged in the Receivership Proceedings in the fall of 2020 when the Debtors formally opposed the Receiver's motion returnable November 9, 2020 approving the sale of the Inkster Property and the Debtors subsequently contested Court of Appeal proceedings related to the approval of the sale of the Inkster Property on the grounds that both the Inkster Property and the Broadway Property should be removed from the receivership because the Credit Facility had already been repaid in full. In the First Pre-Filing Report of Albert Gelman Inc. dated November 5, 2020 (the "**First AGI Report**") attached as Exhibit "A" to the Affidavit of Joe Albert affirmed November 5, 2020, AGI states at paragraph 8(c):

*"Neither the Inkster Property nor Broadway Property needs to be sold to satisfy any obligation NPL has as guarantor under the Credit Agreement (defined below) as the Receiver estimates in its Ninth Report that more than sufficient proceeds have been generated to date to repay the Lenders, the Receiver's Charge, the Landlords' Charge and to fund the payment of Potential Priority Claims, with perhaps some "excess" remaining;"*

58. In the circumstances, the efforts of the Debtors to malign the Receiver and impute improper motives are demonstrably unfounded, improper and objectionable.

### **Separate Corporation Analysis on the Basis of "What Actually Happened"**

#### **NPL Guarantee**

59. Upon further review of the Credit Agreement, the Receiver wishes to clarify prior misleading references in the materials before the Manitoba Court as to the nature of NPL's guarantee (the "**NPL Guarantee**") of the Credit Facility. NPL's guarantee is not limited. Pursuant to the Credit Agreement and related documents, NPL guarantees repayment of the Credit Facility and secures its guarantee obligation by mortgaging certain real

properties and pledging (the “**Share Pledge**”) certain shares of 887 in favour of the Lenders. The recourse of the Lenders to the mortgaged real properties is limited to USD\$20 million, plus enforcement costs; there is no such limited recourse to the pledged shares. Accordingly, it was open to the Lenders to recover the full amount of any outstanding obligations under the Credit Agreement by means of realizing upon the Share Pledge, had the pledged shares been of sufficient realizable value. Accordingly, for the purposes of subrogation and the application of *The Mercantile Law Amendment Act*, it appears to the Receiver that NPL and NEL both participate as “co-sureties” on the same proportionate basis as the other guarantors of the Credit Facility; that is, 1/5<sup>th</sup> of the total of the guarantee obligations, as described in the Twelfth Report.

### **Subrogation in Relation to Repayment of Receiver’s Borrowings**

60. Based on advice from TDS, the granting by the Manitoba Court of the Receiver’s Borrowings Charge in the Receivership Order does not result in any of the Debtors “being surety for the debt or duty of another” or “being liable with another for any debt or duty”, as required to give effect to the indemnity (i.e. “subrogation”) provisions of *The Mercantile Law Amendment Act* (Manitoba), as the Receivership Order does not impose a debt, duty or liability on any of the Debtors for the Receiver’s Borrowings, but rather simply creates a charge against Property to secure repayment of (as described in the Receiver Term Sheet) funding of costs and obligations of the Receiver. The Receiver’s Borrowings are not advances made pursuant to the Credit Facility and repayment of funding provided under the Receiver Term Sheet is not guaranteed by any guarantee given in relation to the Credit Facility. Accordingly, the use of proceeds to repay the Receivers’ Borrowings does not result in any right of subrogation in favour of either NPL or NIP.
  
61. In the result, assuming (as was done in the Twelfth Report) that the total of the guarantee payment required to fully repay the Credit Facility was \$28.4 million and that Net Receivership Proceeds in the amount of approximately \$9.9 million are available for distribution, and further assuming (for the purpose of this analysis only) that all of \$9.9 million in distributable Net Receivership Proceeds are NPL Asset Sale Proceeds, then the Net Receivership Proceeds in the hands of NPL would be subject to at least the following claims:
  - (a) all of the guarantee payment was made by NIP, such that NIP has a subrogated claim (i.e. a claim pursuant to the provisions of *The Mercantile Law Amendment Act* (Manitoba)) as against NPL in an amount equal to 1/5<sup>th</sup> of \$28.4 million, which is \$5.68 million;
  
  - (b) intercorporate obligations of NPL are not impacted by use of NPL Asset Sale Proceeds to repay Receiver’s Borrowings, such that based on the Debtors’ records (i) NIP has an intercompany claim for approximately \$2.5 million and (ii) NIP has an intercompany claim against NEL (which is NPL’s parent corporation) in the

amount of approximately \$18.1 million and a subrogated claim as against NEL (i.e. a claim pursuant to the provisions of The Mercantile Law Amendment Act (Manitoba)) in an amount equal to 1/5th of \$28.4 million, which is \$5.68 million, both of which are enforceable in due course against the assets of NPL;

- (c) NPL has an accrued tax liability to Canada Revenue Agency in the estimated amount of \$3 million; and
  - (d) NPL may have other third-party creditor obligations.
62. The claims against NPL or to which the Net Receivership Proceeds would be, in due course, subject, are substantially in excess of the Net Receivership Proceeds and it is apparent that, on the basis of “what actually happened”, there is no “equity” in NPL or NEL that would enable Mr. Nygard to benefit from the Net Receivership Proceeds.
63. In any event, should the Manitoba Court determine to proceed on the basis of a separate corporation analysis rather than by means of consolidating the assets and liabilities of the Debtors for creditor purposes, and make a finding that the Net Receivership Proceeds are NPL Asset Sale Proceeds, the recommendation of the Receiver would be that the Manitoba Court not simply order the distribution of the Net Receivership Proceeds to NPL but rather, in the usual manner of dealing with distributable receivership proceeds, order that the Receiver conduct a claims process to determine the liabilities of NPL and entitlement to the Net Receivership Proceeds and thereafter distribute the Net Receivership Proceeds to the parties proven to be entitled thereto pursuant to a future distribution order.
64. This approach is consistent with the the Manitoba Court’s Reasons for Judgment in connection with the Landlord Terms Order, in which it was determined that:

*“If amounts in excess of U.S. \$20 million plus costs are collected as a result of the sale of real property and the liquidation process, **the funds realized would be available for other creditors of NPL in accordance with the receivership order.** If the proceeds exceed the limited recourse amount, the Receiver must determine what other debts and obligations are owed by the debtor, consider the priority of those claims, and seek further court authorization to use the balance of the proceeds of realization towards the satisfaction of the other debts and obligations.”* (emphasis added)

A copy of the Transcript of the Manitoba Court’s Reasons for Judgment in connection with the Landlord Terms Order are attached at **Appendix “D”**.

## VII. NPL BRIEF ANALYSIS

65. The subrogation analysis postulated by NPL in the Debtors' Responding Materials is premised on the following assumptions:
- (a) (i) according to the NPL Brief, all NPL Asset Sale Proceeds were "actually" used to repay the Credit Facility or (ii) according to the AGI Report, \$26.9 million of NPL Asset Sale Proceeds were "actually" used to repay the Credit Facility with the balance allocated to receivership expenses (which by necessity means that NIP asset proceeds were used to repay the Receiver's Borrowings);
  - (b) NPL is a "limited guarantor" and therefore responsible as a co-guarantor for a smaller percentage of the guarantee obligation than other guarantors; and
  - (c) Receiver's Borrowings are included in the analysis of co-guarantor obligations (without acknowledging resulting subrogated claims of NIP, as the payor of the Receiver's Borrowings, as against NPL and NEL) and that (without providing any basis therefor) NEL is excluded from the co-guarantor analysis, with the result that NIP, 897 and 879 collectively owe NPL and NEL "an amount in excess of \$21,000,000" (approximately \$21,268,000) "which is equal to, or greater than, any aggregate unsecured amount that could hypothetically be asserted in set-off against NPL/NEL".
66. The above assumptions are incorrect; however, in any event, using "NPL's best position" that all NPL Asset Sale Proceeds were used to repay the Credit Facility, the result is again that there is no "equity" in NPL or NEL that would enable Mr. Nygard to benefit from the Net Receivership Proceeds, as, by the NPL analysis:
- (a) \$9.9 million of the alleged \$21,000,000 would be paid to NPL from NIP, by NPL applying its alleged "secured subrogated claim" to recover the Net Receivership Proceeds, leaving NPL with \$9.9 million and a balance allegedly owing to NPL/NEL by NIP/897/879 of \$11,368,000;
  - (b) the NPL intercompany debt to NIP is in the amount of approximately \$2.5 million, and NEL's intercompany debt to NIP is approximately \$18.2 million, totalling approximately \$20.7 million;
  - (c) applying the balance of NPL's alleged subrogated claim (\$11,368,000) to the NPL/NEL intercompany obligations of \$20.7 million leaves NPL/NEL owing a balance of \$9,332,000 to NIP;
  - (d) Accordingly, in the hands of NPL, the \$9.9 million of Net Receivership Proceeds would be subject to at least the following claims, which total well in excess of \$9.9 million:

- (i) NPL/NEL's intercompany debt to NIP, in the amount of \$9,332,000;
  - (ii) accrued tax liability to Canada Revenue Agency in the estimated amount of \$3 million; and
  - (iii) amounts outstanding to other third-party creditors, if any.
67. If the premise that all NPL Asset Sale Proceeds were used to repay the Credit Facility was accepted, but the remaining assumptions corrected to properly (i) exclude Receiver's Borrowings from the subrogation calculations (or even attribute resulting subrogated rights in favour of NIP, having paid the Receiver's Borrowings); (ii) adjust the percentage co-guarantor liability of NPL to the proper percentage and (ii) factor NEL in as a co-guarantor, then the outcome for NPL, and the prospect of there being "equity" in NPL or NEL available for Mr. Nygard following a claims process and future distribution order, are worse.
68. Respectfully, there does not appear to be any proper, supportable allocation outcome that results in there being "equity" in NPL or NEL available for Mr. Nygard following a claims process and future distribution order.

## VIII. RESPONSE TO THE AGI REPORT

69. In the Receiver's view, the AGI Report is based on several flawed premises and fails to provide any support for its conclusions regarding the amount of Credit Facility repaid by each of the Debtors, including NPL.
70. With respect to the allocation of receivership disbursements/expenses, including corporate overhead and professional costs (collectively, the "**Receivership Costs**"), the separate corporation analysis included in the AGI Report (the "**AGI Separate Corporation Analysis**") allocates a total of approximately \$1.8 million in Receivership Costs to NPL (for comparison, and as detailed in the Receiver's separate corporation analysis included in the Twelfth Report, the Receiver has included a preliminary allocation of approximately \$5.8 million in Receivership Costs to NPL). Based on the Receiver's review/assessment of the AGI Report and AGI Separate Corporation Analysis, the Receiver notes the following:

### **Direct Allocations**

71. The AGI Report takes issue with the Receiver's decision to allocate the Landlords' Charge (estimated at approximately \$2.6 million in the Twelfth Report) equally as between NIP and NPL. The AGI Report opines that NPL should bear no portion of the Landlords' Charge, solely on the basis that NPL was not a party to any of the leases that pertain to the Landlords' Charge.

72. While AGI appears to be correct that NPL was not a party to the lease agreements relating to the Landlords' Charge, AGI ignores the following facts: (i) the Landlord Terms Order specifically charges all Property captured in the Receivership Order (as amended by the General Order), which includes certain NPL properties, (ii) prior to the Appointment Date, the business conducted at the leased premises affected by the Landlords' Charge funded, among other things, the Debtors' common administrative expenses, the benefits of which were shared by NPL, and (iii) as described above, on an actual basis, NPL Asset Sale Proceeds were required to be used to assist in repaying the Receiver's Borrowings (which included the funding of rent payments) and, in due course, the NPL Sale Proceeds were used to fund the payments made pursuant to the Landlords' Charge.
73. In addition, in the Receiver's view, the Unpaid Rent costs charged against the Property are properly a cost of the Receivership Proceedings generally to be shared among those Debtors with assets remaining after repayment of the Credit Facility, which was secured by a charge against the Property in priority to the Landlords' Charge. The Receiver also notes that the Landlord Terms Order, which provides for the Landlords' Charge, was not appealed by the Debtors (or NPL).

#### **Allocation of Corporate Overheads**

74. AGI also disagrees with certain aspects of the corporate overhead allocation recommended by the Receiver including, in particular, the allocation of payroll and professional fees in proportion to the proceeds of realization from the assets of NI, NIP and NPL, albeit that in the AGI Report (at paragraph 11) AGI advises that "it is common to employ an allocation methodology in matters where time and cost to do a direct allocation might otherwise be detrimental to the relevant stakeholders", and that by AGI's Separate Corporation Analysis described in AGI's Supplementary First AGI Report, AGI expressly makes a proportionate allocation of accounts receivable, other collections, and expenses as between NIP and NI based on the proportionate realizations of NIP and NI assets, as "the most reasonable allocation".
75. As described above, on an actual basis, NPL Asset Sale Proceeds were required to be used to assist in funding Receiver's Borrowings, which included the funding of corporate overheads.

#### **Corporate Payroll**

76. With respect to the corporate payroll component of the corporate overhead allocation, AGI contends that the Receiver's recommended allocation of approximately \$1.44 million (corporate payroll totaled approximately \$4.65 million) to NPL is inappropriate and a "red flag", supporting AGI's conclusion that the Receiver's allocation methodology is not fair, equitable or reasonable.

77. According to AGI, a reasonable methodology for allocating corporate payroll to NPL would be aligned with how much an arm's length property manager would charge NPL for the basic administration and oversight of its properties. Based on an email from a commercial real estate broker appended to the AGI Report, which indicates that fees for basic property management services (i.e. client accounting, collecting rents, tenant relations, vendor contracts and platform) range from 2.5% - 3.0% of gross rents, AGI concludes that an a reasonable allocation of corporate payroll to NPL would be \$39,000 (or 3% of annual base rental income).
78. In the Receiver's view, AGI's analysis is flawed for a variety of reasons:
- (a) as detailed in the Separate Corporation Analysis included in the Twelfth Report, corporate payroll (\$4.6 million) represents approximately 34% of total payroll incurred in the Receivership Proceedings, as the Receiver has already specifically attributed approximately \$9.1 million in payroll costs to NIP (\$8.1 million) and NI (\$1 million) in respect of efforts to among other things, liquidate the retail inventory in those entities. The remaining approximately \$4.6 million in corporate payroll is reflective of general payroll costs associated with managing the Nygard Group through the receivership process. Accordingly, allocating corporate payroll based in proportion to the proceeds of realization from the assets of NI, NIP and NPL (the only Debtors with realizable assets) is, in the Receiver's view, reasonable, fair, and equitable. In fact, other than the liquidation of the Nygard Groups' retail inventory, the bulk of the work done in the Receivership Proceedings related to efforts to deal with the NPL properties captured by the Receivership Order (as amended) and the claims and issues raised by the Debtors overwhelmingly in the interests of NPL; and
  - (b) it is unclear to the Receiver how the analogy to "property management" services is appropriate in the context of the Receivership Proceedings. As AGI should be aware, the role of corporate staff in connection with the NPL properties during the course of the Receivership Proceedings was not akin to that of a regular property manager, but involved significant time and expense to, among other things, assist the Receiver in the negotiation of the sale agreements and prepare the NPL properties for sale. As noted in certain of the Prior Reports, the sales of the NPL properties were not simple real estate transactions – the NPL properties were decades-old properties that required significant time and effort to identify potential interested parties, clean, update and otherwise prepare the properties in order to complete the contemplated transactions. For example, paragraphs 71 – 91 of the Ninth Report filed in support of the sale of the Inkster Property provide a detailed account of the myriad of health and safety/building permit and code issues impacting the Inkster Property as well as the steps taken/options considered by the Receiver in respect of these matters. Although, at the time of the filing of the Ninth Report, this information was provided to assist the Manitoba Court in its assessment of the value to be realized from the sale of

the Inkster Property, it also provides evidence of the significant time and expense in respect of only one issue impacting the sale of the Inkster Property. The Receiver further notes that several staff were actively employed through February 2021 in preparation for the sale of the Inkster Property and the Broadway Property.

79. As described above, on an actual basis, NPL Asset Sale Proceeds were required to be used to assist in funding Receiver's Borrowings, which included the funding of corporate payroll.
80. In consideration of the above, in the Receiver's view, it should be evident that allocation of corporate payroll in proportion to proceeds of realization is reasonable, fair and equitable.

### **Professional Fees**

81. In terms of the allocation of professional fees, AGI appears to support the position that NPL should bear no portion of the professional fees and costs of the Receivership Proceedings generally and only a very limited portion of the fees and costs of the Receiver in addressing the many matters involving NPL over the course of the Receivership Proceedings.
82. According to AGI, the Receiver's allocation of professional fees is unfair because NPL's assets consist entirely of real estate assets and that such assets "almost always" involve far less time for a receiver versus realizing on inventory and accounts receivable.
83. AGI contends that a 10% allocation of professional fees to NPL, as previously set out by AGI in the First Supplementary AGI Report, would, in its opinion, be appropriate, notwithstanding that AGI stated, in the First Supplementary AGI Report, that its allocation of 10% of professional fees to NPL was done "arbitrarily".
84. In the Receiver's view, AGI's assertion ignores the obvious fact that a significant part of the professional time involved in the Receivership Proceedings (particularly with respect to legal costs) has been in connection with issues related to (or dealing specifically with) NPL matters, property and claimed interests in NPL Asset Sale Proceeds. A non-exhaustive account of those matters in which NPL actively took positions in relation to many of the motions brought before the court in these Receivership Proceedings (whether ultimately opposing the motions or not), includes motions dealing with (i) the Receivership Order and the General Order, (ii) the DEFA Order, (iii) the Landlord Terms Order, (iv) Notre Dame Approval and Vesting Order, (v) the Niagara Approval and Vesting Order, (vi) the NOI Withdrawal Order, (vii) the Document Abandonment Order, (viii) the Inkster Approval and Vesting Order, and (ix) the Broadway Approval and Vesting Order. NPL actively participated in the negotiation of the E/B Settlement Agreement, the E/B Settlement Approval Order and related matters. NPL filed an appeal of

the Inkster Approval and Vesting Order (the “**Inkster Appeal**”) seeking, among other things, the discharge of the Receiver. NPL also contested the Receiver’s motion to the Manitoba Court of Appeal cancelling the automatic stay imposed pursuant to section 193 of the BIA upon the filing of the Inkster Appeal and contested the approval of the Receiver’s accounts and those of its counsel. The Debtors raised issues regarding Mr. Nygard’s tenancy at the Notre Dame Property and were directly involved in negotiating the NPL Proceeds Preservation Agreement. In the result, the positions taken and the issues raised by NPL during the Receivership Proceedings, and communications with Debtors’ counsel advancing the interests of NPL, have required the Receiver and its legal counsel to expend significant time addressing these matters which has materially contributed to the total professional fees and expenses incurred in the Receivership Proceedings.

85. The Receivership Order specifically charges the Property (including the NPL real properties sold by the Receiver) with the Receiver’s fees and disbursements. NPL did not appeal the granting of the Receiver’s Charge or the Receiver’s Borrowings Charge.
86. In consideration of the above, in the Receiver’s view, it should be evident that allocation of professional fees in proportion to proceeds of realization is reasonable, fair and equitable.

#### **AGI’s Separate Corporation Analysis**

87. The AGI Report concludes with its own Separate Corporation Analysis, which tracks the Receiver’s format, but incorporates the changes in allocations noted above. The other significant adjustment to the Receiver’s analysis is that all net proceeds remaining from the sale of the NPL properties (approximately \$26.9 million based on AGI’s calculation/reallocation) is attributed to repayment of the “repayment of debt”. All remaining NI sale proceeds and certain limited NIP proceeds are used to fully repay the “debt” resulting in all funds remaining in the receivership being attributed to NIP.
88. In addition to the failings of the AGI analysis outlined above, the Receiver notes that AGI has not provided any explanation or analysis with respect to why or on what basis all NPL’s net remaining sale proceeds are applied towards repayment of the Credit Facility. There is no commentary on the Receiver’s analysis detailed in the Twelfth Report which concludes that, in the circumstances of these Receivership Proceedings, the obligations of NIP and NPL, as guarantors, to repay the Credit Facility should be split equally.
89. Notwithstanding the Receiver’s commentary above, even if the Manitoba Court accepted the AGI Separate Corporation Analysis in its entirety, there is still no “equity” in NPL or NEL that would enable Mr. Nygard to benefit from the Net Receivership Proceeds (as described in paragraphs 65 to 68 above).

## **IX. ADDITIONAL CONSIDERATIONS RESPECTING THE DEBTORS' RESPONDING MATERIALS**

### **Consolidation Matters**

90. While both the AGI Report and NPL Brief have focused considerable attention on the Receiver's Separate Corporation Analysis (as discussed above), the Debtors' Responding Materials have provided little, if any, evidence to refute the Receiver's position in support of the substantive consolidation of the Debtors for creditor purposes detailed in the Twelfth Report.
91. Paragraph 24 of the NPL Brief states that "it is not an exaggeration to say that the Arbitrary Allocation is the basis of the Receiver's Argument for the substantive consolidation and subsequent bankruptcy of NPL and its owner NEL". Further, paragraph 60 of the NPL Brief puts forward the erroneous position that "it is because NPL is solvent, asset-rich and a secured creditor of other respondents that the Receiver wants to make it subject to a consolidation order". As detailed in this Second Supplementary Twelfth Report, the Receiver disagrees with the statements/positions put forward by the Respondents in the NPL Brief.
92. In connection with the foregoing, one of the primary purposes of the Receiver's Separate Corporation Analysis included in the Twelfth Report was to dispel of the notion that NPL, NEL or their ultimate shareholder, Peter Nygard, are prejudiced by substantive consolidation of the Debtors.
93. As noted in paragraph 196 of Twelfth Report, in considering the appropriateness of substantively consolidating the Debtors' separate estates for creditor purposes, it is essential to balance the relative economic benefits of consolidation to creditors against the prejudice, if any, to particular creditors from substantive consolidation. In this regard, paragraph 198 of the Twelfth Report concludes that (i) CRA and perhaps other direct unsecured creditors of NPL, if any, are economically prejudiced by the substantive consolidation of the Debtors, and (ii) employees, landlords, suppliers and other vendors, gift card holders, and tax authorities owed debts by NIP, NI and other Debtors (not including NPL) are economically advantaged by the substantive consolidation of the Debtors. As stated, in the Receiver's view, there is no scenario in which any of the Net Receivership Proceeds do not ultimately accrue to NIP.
94. While certain elements supporting the substantive consolidation of the Debtors were addressed throughout the Twelfth Report, paragraphs 131 – 200 of the Twelfth Report provide a comprehensive analysis of the factors that, in the Receiver's view, overwhelmingly support the substantive consolidation of the Debtors. The Receiver's Separate Corporation Analysis was a minor part of the Receiver's analysis used to reinforce the preponderance of the other evidence put before the Manitoba Court supporting the substantive consolidation of the Debtors.

## Solvency of NPL and NEL

95. The Debtors make various statements regarding the solvency of NPL and NEL in the NPL Brief, including that:
- (a) the Receiver “concedes” that NPL is solvent;
  - (b) NPL and NEL “own assets worth millions of dollars”;
  - (c) NPL is “asset rich”; and
  - (d) NPL “may have millions in cash to its credit”.
96. The Receiver notes as follows with respect to the Debtors’ assertions regarding the solvency of NPL and NEL:
- (a) in the Twelfth Report, the Receiver concluded that NPL and NEL are insolvent on a consolidated basis, and NPL may be insolvent on a separate corporation basis depending on the outcome of a rigorous allocation of receivership expenses and the extent of NPL’s direct liabilities;
  - (b) the AGI Report does not comment on the solvency of NPL and/or NEL; and
  - (c) the only Affidavit and/or expert evidence (and not purported “evidence” contained in a legal brief) produced by the Debtors with respect to the solvency of NPL and NEL is contained in the First AGI Report, the supplementary first AGI report dated November 12, 2020 (the “**Supplementary First AGI Report**”), and the Affidavit of Greg Fenske affirmed November 5, 2020 and certain email correspondence from LTGLC to TDS. The Receiver notes as follows with respect to the said materials:
    - (i) at paragraph 80 of the First AGI Report, AGI sets out the book value and estimated realizable value of NPL assets as at November 5, 2020. The only assets which AGI records as having any realizable value are under the heading “Land and Buildings”. Following the filing of the First AGI Report, the Inkster Property, Broadway Property, Falcon Lake Property and Fieldstone Properties were sold. The proceeds from the sale of the Falcon Lake Property and Fieldstone Property were to be addressed by the NPL Proceeds Preservation Agreement. The Receiver understands that there is approximately \$375,000 remaining in respect to these proceeds;
    - (ii) in the Affidavit of Greg Fenske affirmed November 5, 2020, Mr. Fenske identifies an intercompany payable owing from Nygard Business Consultancy (Shanghai) Co. Ltd. (“**NBCS**”) to NPL in the amount of \$2,038,864 (the “**NBCS Receivable**”) representing funds loaned to NBCS to fund the build-out of a building located in Shanghai, China (the “**Shanghai Building**”)

as having no realizable value on the basis that the Chinese government had seized control of the Shanghai Building as a result of monies owing by NBCS to its former employees. A \$3.2 million investment in NBCS (the “NBCS Investment”) is also estimated by Mr. Fenske as having no realizable value. On that basis, AGI also assessed the NBCS Receivable as having no realizable value;

- (iii) As set out in the Supplementary Ninth Report, the Receiver understands that NBCS purchased the Shanghai Building in 2013, through funds which appeared to have been loaned from NIP to NPL (or an affiliate) to NBCS, for the Canadian-equivalent of \$2.8 million;
- (iv) in the Affidavit of Greg Fenske affirmed April 28, 2021, Mr. Fenske set out certain activities he had performed on behalf of NPL during the course of the Receivership Proceedings which included, among other things, managing “the disposition of the staff and building at the NPL Shanghai office;”;
- (v) as set out in the Twelfth Report, as at June 4, 2021, NPL’s books and records include the NBCS Receivable as well as the NBCS Investment;
- (vi) on or about July 20, 2021, in a telephone conversation as subsequently confirmed by email correspondence, LTGLC advised TDS that earlier in 2021, the Shanghai Court had permitted a loan arranged by an employee of NBCS for the payment of certain former employees to be secured against the Shanghai Building and that after payment of the loan was made, the Shanghai Court released the security against the Shanghai Building. Efforts were subsequently made to sell the Shanghai Building and NBCS had accepted an offer to purchase the Shanghai Building in the amount of \$19,500,000 Yuan. At that time, it was expected that if the transaction closed, the net sale proceeds would total approximately \$1-2 million. However, the Debtors understood that there was no way to get the sale proceeds from China to Canada;
- (vii) Counsel for the Debtors’ further indicated that “[o]ur understanding (and there is no evidence to the contrary), is that the building is owned by a Chinese company which in turn is owned by a Hong Kong Company which is ultimately owned by Peter Nygard.”

A copy of the e-mail correspondence from counsel for the Debtors to counsel for the Receiver is attached as **Appendix “E”**;

- (viii) NPL has produced no evidence as to the ownership of NBSC and/or the Shanghai Building. The Debtors' records disclose certain correspondence which raise questions as to the ownership of NBCS and the Shanghai Building, as well as the flow of funds in relation to the acquisition of the Shanghai Building. However, as noted in the Twelfth Report, NPL's books and records include the NBCS Receivable and the NBCS Investment; and
- (ix) At paragraph 100 of the First AGI Report, AGI sets out the book value and estimated realizable value of NEL assets as at November 5, 2020. The only NEL asset which AGI records as "collectable" is a loan to Peter Nygard worth approximately \$8,400.00. However, AGI notes that the value of most of NEL's assets were unknown, including: (i) investment in NPL, (ii) Ameriprise Mutual Funds and investments (net of margin), (iii) investment Anchor Free, and (iv) miscellaneous investments. However, both AGI (in the First AGI Report), and Greg Fenske (in the Affidavit of Greg Fenske affirmed November 5, 2020) note that "most of its [the investments] value was lost through devaluation of the shares held in the retail industry and the balance was expended on professionals, consultants and business expenses including insurance costs" (the First Pre-Filing Report at para 107; see also, the Affidavit of Greg Fenske affirmed November 5, 2020 at para 13).

In granting the Inkster Approval and Vesting Order, the Manitoba Court considered the First AGI Report, the Supplementary First AGI Report and the Affidavit of Greg Fenske affirmed November 5, 2020 and found that "there is insufficient evidence to establish that NEL and NPL are solvent entities, and I do not accept the opinion of AGI that they are solvent..."

A copy of the Transcript of the Manitoba Court's Reasons for Judgment in connection with the Inkster Approval and Vesting Order are attached at **Appendix "F"**.

- 97. There has been no substantive challenge of the Receiver's assessment as to the solvency of NPL and NEL (or any of the other Debtors). AGI has not provided an opinion as to the solvency of NPL and NEL and no valuation of the assets of NPL and NEL has been produced by AGI or any other qualified expert on behalf of the Debtors.

#### **Misleading / Inaccurate Statements and Allegations of Impropriety in the NPL Brief**

- 98. In order to clarify the record for the Manitoba Court, the Receiver intends to briefly address certain statements in the NPL Brief which inaccurately quote and/or "summarize" and/or "restate" the Receiver's evidence and certain allegations of impropriety on the part of the Receiver.

99. The Receiver notes that the Debtors have included additional language in certain excerpts from materials which are relied upon by the Debtors in the NPL Brief:

- (a) at paragraph 30 of the NPL Brief, the Debtors include an excerpt from paragraph 102 of the Twelfth Report. The Debtors have altered the quotation in a manner which alters the evidence of the Receiver. The excerpt is cited as follows by the Debtors:

*“[t]he Receiver considers that its allocation of repayment is fair and **equitable [further to what the Lenders might hypothetically have done]**” (emphasis added)*

Paragraph 102 of the Twelfth Report actually reads:

*“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.”*

The Receiver further notes that paragraph 102 is a conclusion reached by the Receiver on the basis of the Receiver’s analysis set out in paragraphs 99-101 of the Twelfth Report and that this Second Supplementary Twelfth Report clarifies the nature of the NPL guarantee.

100. The Debtors mischaracterize and/or inaccurately state the position of the Receiver on various issues, as follows:

- (a) the Debtors make incorrect statements in the NPL Brief regarding the Receiver’s position on NPL’s rights of subrogation:
- (i) at subparagraph 3(3), the Debtors state that the *“receiver declares that its allocation means NPL does not have rights of subrogation accorded it [sic] by statute”*;
  - (ii) at paragraph 17, the Debtors state that the Receiver *“argued that NPL did not have subrogated rights”*; and
  - (iii) at paragraph 52, the Debtors state that *“[t]he Receiver asks the Court to indulge the Arbitrary Allocation because the Receiver believes that the Allocation eliminates NPL’s statutory rights of subrogation and therefore strengthens the Receiver’s argument for a substantive consolidation of the respondents’ estates.”*;

the statements set out above with respect to the Receiver's position are incorrect. At paragraph 116 of the Twelfth Report, the Receiver states that both NPL and NIP are equally subrogated to the rights of the Lenders, as against the Borrowers, in the full amounts of their guarantee payments and are equally subrogated to the rights of the Lender, as against Debtor co-guarantors for equal contributions to repayment of the Credit Facility attributable to guarantors, resulting in subrogated claims. However, neither NIP nor NPL has subrogated rights as against one another and 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, the rights of both NIP and NPL as guarantors under *The Mercantile Law Amendment Act (Manitoba)*, have no practical significance in this case.

- (b) The Debtors make contradictory statements regarding the Receiver's position with respect to prejudice arising from consolidation:
- (i) at subparagraph 3(4) of the NPL Brief, the Debtors state that "the receiver suggests that because NPL does not have rights of subrogation, neither NPL nor the company which owns it, NEL, would be prejudiced by a consolidation order..."; and
  - (ii) at paragraph 19, the Debtors state that "[t]he Receiver has conceded that NPL is solvent, and that NPL and its creditors would be prejudiced by a substantial consolidation".

The Receiver's comments on prejudice arising out of consolidation are clearly set out at paragraphs 196-200 of the Twelfth Report.

101. The Receiver takes issue with certain allegations made by the Debtors regarding the Receiver's conduct, including, among other things, that:

- (a) the Receiver has "effectively" or "tacitly" refused to answer the Questions and/or Revised Questions and has "declined to explain" the Receiver's allocation "[c]ontrary to a direction from this Court" (see paragraphs 3(2), 27-29 and 32 of the NPL Brief). The Receiver's responses to these allegations are contained in paragraphs 39 to 58 herein. The answers provided to the Debtors by the Receiver in response to the Questions and the Revised Questions can be found at Appendix "B" to this Second Supplementary Twelfth Report and Exhibit "B" to the Mackie Affidavit, respectively; and
- (b) the Receiver's allocation "constitutes a breach of the Receiver's duty to NPL and NEL 'to exercise reasonable care in the disposal of the [receivership] assets'" and is a "breach of the Receiver's duty to 'be

*impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, [and to] appear to have those qualities”* (see paragraph 53 of the NPL Brief). In response to this allegation:

- (i) the Receiver was appointed in part on the basis of the finding of the Manitoba Court that the Debtors were not acting in good faith and had failed to comply with previous Orders of the Manitoba Court;
- (ii) between the Appointment Date and the date of this Second Supplementary Twelfth Report, the Receiver has filed 21 Reports (inclusive of the Second Supplementary Twelfth Report) reporting, in detail, on actions and activities of the Receiver throughout the Receivership Proceedings;
- (iii) the Manitoba Court has approved the actions and activities of the Receiver on ten occasions;
- (iv) the Debtors have not appealed any of the Orders approving the actions and activities of the Receiver, save for the Inkster Approval and Vesting Order, which appeal was abandoned by the Debtors;
- (v) the allegations are consistent with a pattern of conduct by the Debtors throughout the Receivership Proceedings which has forced the Receiver to spend considerable time and resources, at the ultimate expense of the creditors, in addressing and responding to unsubstantiated allegations relating to the conduct of the Receiver, none of which have been accepted by the Manitoba Court;
- (vi) the Manitoba Court has repeatedly found that the Receiver was appointed for the benefit of all stakeholders. As stated by the Manitoba Court in connection with the granting of the Dillard’s Settlement Approval Order:

*“Receivers often have to make difficult business choices that require careful cost/benefit analysis in the weighing of competing and in some cases irreconcilable differences or interests. The Receiver must consider all of the available information, the interests of legitimate stakeholders and proceed in an even-handed manner...”*

A copy of the Transcript of the Manitoba Court’s Reasons for Judgment in connection with the Dillard’s Settlement Approval Order are attached at **Appendix “G”**.

- (vii) the Manitoba Court has consistently found that the Receiver has exercised its duties in accordance with the powers conferred by the Manitoba Court pursuant to the Receivership Order, and is in the best position to liquidate assets, assess the priority of the various claims, and make a recommendation to the Court to address claims of other stakeholders.

102. In the circumstances, the Debtors' allegations of breach of duty against the Receiver and the attempts to malign the Receiver and impute improper conduct and/or motives are demonstrably unfounded, improper and objectionable.

## **X. CONCLUSION**

103. In consideration of all of the above, the Receiver respectfully submits to the Manitoba Court make an Order granting the relief included in the notice of motion submitted in respect of the Net Receivership Proceeds Motion and summarized in the Twelfth Report.

All of which is respectfully submitted on this 30<sup>th</sup> day of November, 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**

# **APPENDIX A**

---

**From:** Wayne M. Onchulenko <WOnchulenko@ltglc.ca>  
**Sent:** Thursday, September 16, 2021 2:43 PM  
**To:** Bruce Taylor  
**Subject:** RE: Nygard Receivership - Questions [LAW-TDS.FID1853952]

11 it is.

**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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**From:** Bruce Taylor <GBT@tdslaw.com>  
**Sent:** September 16, 2021 1:36 PM  
**To:** Wayne M. Onchulenko <WOnchulenko@ltglc.ca>  
**Cc:** Ross McFadyen <RAM@tdslaw.com>; Melanie LaBossiere <MML@tdslaw.com>  
**Subject:** RE: Nygard Receivership - Questions [LAW-TDS.FID1853952]

Wayne, I have a call at 10:30, but 11 am would work. Let me know.

---

**From:** Wayne M. Onchulenko <[WOnchulenko@ltglc.ca](mailto:WOnchulenko@ltglc.ca)>  
**Sent:** Thursday, September 16, 2021 1:26 PM  
**To:** Bruce Taylor <[GBT@tdslaw.com](mailto:GBT@tdslaw.com)>  
**Subject:** Re: Nygard Receivership - Questions [LAW-TDS.FID1853952]

A discussion tomorrow sounds like a good plan. I have a case conference at 9. How about 10:30?

Sent from my iPhone

On Sep 16, 2021, at 1:24 PM, Bruce Taylor <[GBT@tdslaw.com](mailto:GBT@tdslaw.com)> wrote:

Wayne, we are not in a position to interpret what questions you consider meet Justice Edmond's guidance, or what are "all questions related to the allocation of revenue and expenses and intercompany debts" – Justice Edmond did not simply direct that all such questions be answered.

Perhaps we can arrange a call tomorrow to discuss how we move forward.

---

**From:** Wayne M. Onchulenko <[WOnchulenko@lglc.ca](mailto:WOnchulenko@lglc.ca)>  
**Sent:** Thursday, September 16, 2021 1:18 PM  
**To:** Bruce Taylor <[GBT@tdslaw.com](mailto:GBT@tdslaw.com)>  
**Cc:** Colby Linthwaite <[colby@fredtayar.com](mailto:colby@fredtayar.com)>; Melanie LaBossiere <[MML@tdslaw.com](mailto:MML@tdslaw.com)>; Ross McFadyen <[RAM@tdslaw.com](mailto:RAM@tdslaw.com)>  
**Subject:** RE: Nygard Receivership - Questions [LAW-TDS.FID1853952]

Hi Bruce

Please provide us, as soon as possible, with a list of questions you agree should be answered, incorporating the directions of Justice Edmond, in addition to all those related to the allocation of revenue and expenses and intercompany debts.

**Wayne M Onchulenko\***

<image001.png>

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

204 957.6402 v  
204 957.1696 f

**Bar Admissions:** Manitoba, Ontario and Nunavut

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**From:** Bruce Taylor <[GBT@tdslaw.com](mailto:GBT@tdslaw.com)>  
**Sent:** September 16, 2021 1:15 PM  
**To:** Wayne M. Onchulenko <[WOnchulenko@lglc.ca](mailto:WOnchulenko@lglc.ca)>  
**Cc:** Colby Linthwaite <[colby@fredtayar.com](mailto:colby@fredtayar.com)>; Ross McFadyen <[RAM@tdslaw.com](mailto:RAM@tdslaw.com)>; Melanie LaBossiere

<[MML@tdslaw.com](mailto:MML@tdslaw.com)>

**Subject:** Nygard Receivership - Questions [LAW-TDS.FID1853952]

Wayne, please provide us as soon as possible with your refined list of questions incorporating the directions and guidance of Justice Edmond.

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Click the following links to [unsubscribe](#) or [subscribe](#) to TDS e-communications.

## **APPENDIX B**



THOMPSON  
DORFMAN  
SWEATMAN

Writer's Name  
Direct Telephone  
E-mail Address

G. Bruce Taylor  
204-934-2378  
GBT@tdslaw.com

October 6, 2021

VIA E-MAIL

Levene Tadman Golub Law Corporation  
700-330 St. Mary Avenue  
Winnipeg, Manitoba R3C 3Z5

Attention: Wayne Onchulenko

Dear Sirs:

Re: Richter Advisory Group Inc. and  
Nygard International Partnership et al.  
Questions to the Receiver  
Our Matter No. 0173004 GBT

---

We write on behalf of Richter Advisory Inc. in its capacity as Court-appointed receiver (the "**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 ("**NIP**", and together with the other listed entities, the "**Debtors**").

### The Questions

You have suggested that (in the process of addressing the list of questions provided to the Receiver by the Debtors and attached as Schedule "A" to the Notice of Motion of the Debtors dated September 7, 2021 (the "**Questions List**") pursuant to the directions of the Honourable Mr. Justice Edmond on September 16, 2021) we identify and provide the answers to appropriate questions which have been identified as questions which specifically relate to:

1. the separate corporation analysis / allocation / intercompany balances; and
2. the facts and information relied upon by the Receiver in coming to the conclusions as detailed in the Twelfth Report of the Receiver dated June 4, 2021 (the "**Twelfth Report**").

We have done so below.



Although we remain of the view the Receiver is not required to answer any questions for which answers are available in materials filed with the Court or otherwise made available to the public on the Receiver's website, we have included, for your convenience, certain answers which provide the reference to paragraphs in the Twelfth Report and/or other materials that are responsive to the questions. The answers provided are based on the scope of the Receiver's analysis of these matters to date, and the information available to and reviewed by the Receiver to date, as described in the Twelfth Report and such other materials. The Receiver reserves the right to supplement or elaborate upon these answers based on further analysis or information as the circumstances warrant. To be clear, the Receiver reserves the right to object to answering other questions included on the Questions List should the Receiver consider it appropriate and proper to do so, in the context of the directions provided by Justice Edmond.

As noted at paragraphs 94(b) and 98 of the Twelfth Report, the Receiver has completed a reasonable and appropriate allocation for the purposes of the Twelfth Report and will require an opportunity to undertake a more detailed allocation should the Court find that claims are to be determined on a separate corporation basis. This further allocation exercise will be an extremely time consuming and costly exercise. In accordance with the direction of the Court, all questions which would require that the Receiver undertake a further allocation exercise have been excluded.

### Answers

Please note that for the purposes of this correspondence, the numbering of each question answered below accords with the number of that question on the Questions List. As certain of the questions on the Questions List are compound questions, numbers may appear more than once.

**Question 1:** With respect to the chart at paragraph 104, called "Separate Corporation Analysis":

- (i) under the heading "payroll", please explain how the \$8.1 million figure was calculated for NIP?

**Answer:** there are multiple payroll runs (consistent with the Debtors' practice prior to Receivership). This is the sum of the outflows for the "retail" payroll run.

- (ii) why was \$980,000 in payroll allocated to the US entities?

**Answer:** there are multiple payroll runs (consistent with the Debtors' practice prior to Receivership). This is the sum of the outflows for the "US" payroll run.



(iii) why was \$4.647 million in overhead allocated to corporate overheads?

**Answer:** the Debtors have multiple payroll runs (consistent with the Debtors' practice prior to Receivership). This is the sum of the outflows for the "corporate" payroll run.

**Question 2:** 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?

**Answer:** see paragraph 96 of the Twelfth Report.

**Question 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?

**Answer:** No. This statement is incorrect. Included within corporate overhead allocations are only corporate payroll, professional fees, receiver's sales tax and estimated remaining outflows.

Corporate overhead was calculated (in 000s) as follows: \$4,647 (corporate payroll) + 6,438 (professional fees) + \$201 (receiver's sales tax) + \$2,000 (estimated remaining outflows) - \$7 (receipts) = \$13,279

Total corporate overhead was allocated across NIP, NI and NPL in proportion to gross proceeds.

**Question 5:** If not, explain the basis supporting \$4.155 million in corporate overhead allocation for NPL.

**Answer:** see paragraphs 94(b) and (d), and 104(Note 1) of the Twelfth Report.

**Question 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.

**Answer:** see paragraphs 37 to 44 of the Seventh Report of the Receiver dated September 10, 2020 (the "**Seventh Report**"). The amounts noted therein are in USD. There is some additional interest / fees / foreign exchange / "Ledger Debt"



that would factor into a dollar-for-dollar reconciliation; however, the balances are materially the same and have been reported (and approved) by the Court.

Gross repayments noted in paragraph 104(Note 2) of the Twelfth Report are \$36,384,000 which reconciles to the approximately \$36,000,000 (CAD) noted in paragraph 37 of the Seventh Report.

**Question 36:** With respect to para. 86, which dispositions of property are expected to generate net proceeds of 9.9 million?

**Answer:** the \$9.9 million noted in paragraph 86 of the Twelfth Report are not prospective receipts. The figure refers to the cash on hand within the May 15 R&D (as defined in the Twelfth Report) less the remaining expenses outlined in paragraph 84 of the Twelfth Report.

**Question 36:** Please break down the proceeds by property.

**Answer:** see paragraph 93 of the Twelfth Report.

**Question 39:** With respect to para. 91(a)-(d),

(i) how “meaningful” would the equity in NPL be in each outcome?

**Answer:** see paragraph 128 of the Twelfth Report. Even if NPL is left with all of the Net Receivership Proceeds, NPL equity could only be increased by \$1.4 million, all of which would be subject to the substantial intercompany obligations of NEL to NIP.

(ii) Has the Receiver computed the subrogated claim which NIP has?

**Answer:** see paragraphs 114-123 and 128 of the Twelfth Report.

(iii) Ditto re NPL?

**Answer:** see paragraphs 114-123 and 128 of the Twelfth Report.

(iv) Please show the Receiver’s calculation.



**Answer:** see paragraphs 114-123 and 128 of the Twelfth Report.

**Question 41:** With respect to para. 94(b), please elaborate on what “a more rigorous process of allocating expenses” consists of.

**Answer:** see paragraphs 94(b) and 98 of the Twelfth Report.

**Question 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”.

**Answer:** all of the operating disbursements have already been allocated to an entity, as described at paragraphs 91 and 104(Note 2) of the Twelfth Report. Receiver’s borrowings were not used to “accumulate” cash. This is due to the nature of the “cash sweep” mechanism in the cash management system.

For example, assume \$100 in receipts and \$100 in disbursements. NIP collects \$100 and NIP remits \$100 to the Lenders through the “cash sweep” mechanism. The Lenders fund \$100 to NIP / the Receiver and NIP / the Receiver disburse \$100 to a supplier.

Therefore, the Receiver’s borrowings are grossed up as cash inflows were swept to the Lenders (until the Lenders were repaid) and the Lenders provided funding for disbursements.

**Question 52:** With respect to para. 112, does the Receiver accept the inter-company balances reflected there in support of its motion?

**Answer:** at paragraphs 108 to 111 of the Twelfth Report, the Receiver makes a number of comments with respect to the reliability of the intercompany balances as stated at paragraphs 112, 175 and 189 (Note 9) of the Twelfth Report.



THOMPSON  
DORFMAN  
SWEATMAN

As noted at paragraph 98 of the Twelfth Report, the Receiver will require an opportunity to undertake a more detailed exercise should the Court find that claims are to be determined on a separate corporation basis.

Yours truly,

THOMPSON DORFMAN SWEATMAN LLP

FOR:

G. Bruce Taylor

GBT/mml

## **APPENDIX C**

**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.  
SEVENTH REPORT OF THE RECEIVER**

**SEPTEMBER 10, 2020**

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## APPENDICES

**APPENDIX “A”** – Redacted copy of the E/B Settlement Agreement dated September 4, 2020

**APPENDIX “B”** – Motion of the Debtors filed on September 4, 2020 in the Chapter 15 Proceedings

**APPENDIX “C”** – Summaries of the accounts of Richter (for the period from July 27, 2020 to August 30, 2020) and TDS (for the period of July 20, 2020 to August 30, 2020)

**APPENDIX “D”** – Redacted accounts of Richter (for the period from July 27, 2020 to August 30, 2020) and TDS (for the period of July 20, 2020 to August 30, 2020)

## CONFIDENTIAL APPENDICES

**CONFIDENTIAL APPENDIX “1”** – Unredacted copy of the E/B Settlement Agreement dated September 4, 2020

**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.  
SEVENTH REPORT OF THE RECEIVER**

**SEPTEMBER 10, 2020**

## 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, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC (collectively, the “**US Debtors**”), Nygard Enterprises Ltd. (“**NEL**”), Nygard International Partnership (“**NIP**”), Nygard Properties Ltd. (“**NPL**”), 4093879 Canada Ltd., and 4093887 Canada Ltd. (collectively, the “**Canadian Debtors**”) (the US Debtors and the Canadian Debtors together, the “**Nygard 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 and filed in these proceedings.
4. Also on March 18, 2020, the Receiver, as the duly appointed 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 will provide 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 permit. 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, 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 13, 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 (i) pay occupancy rent and maintain the California Properties (as hereinafter defined) in accordance with the California Properties Leases (as hereinafter defined) and (ii) to advise the Gardena Landlords of its intentions regarding the occupancy of the California Properties by no later than May 31, 2020, or in the alternative, an order lifting of the stay of proceedings granted by the Manitoba Court in these proceedings so that the Gardena Landlords may terminate the California Properties Leases for failure of the Receiver to pay occupancy rent and retake possession of the California Properties. The Gardena Motion, which was originally scheduled to be heard by the Manitoba Court on August 10, 2020, had been rescheduled to be heard on September 14, 2020, however the Gardena Motion will not be proceeding as a result of the E/B Settlement Agreement described below.
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.

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. 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>.
13. 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 issued by the Manitoba Court are posted to and available for review at the Receiver’s Website.
14. Copies of the pleadings and other materials filed in the Chapter 15 Proceedings, and the various Orders issued by the US Court are also posted to and available for review at the Receiver’s Website.
15. 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**

16. 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.
17. 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.
18. 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. A copy of the Third Report is available on the Receiver's Website.
19. 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.
  20. 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.
  21. 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.
  22. The purpose of this report, the Receiver's seventh report (the "**Seventh Report**") is to provide information to the Manitoba Court in respect of the following:
    - (a) the actions and activities of the Receiver since the Sixth Report;
    - (b) the Receiver's interim statement of receipts and disbursements for the period from the Appointment Date to September 5, 2020 (the "**September 5 Interim R&D**");
    - (c) the terms of a settlement agreement (the "**E/B Settlement Agreement**") dated September X, 2020, entered into by the Receiver, the Gardena Landlords, NPL, Peter Nygard and certain other members of the Nygard business organization (the "**Nygar Organization**"), to settle, among other things, the matters raised in the Gardena Motion;
    - (d) an update on the Chapter 15 Proceedings; and
    - (e) the fees and disbursements of the Receiver and its counsel.
  23. A further purpose of this Seventh Report is to provide the Manitoba Court with an evidentiary basis to make Orders:
    - (a) approving this Seventh Report and the actions / activities of the Receiver described herein;
    - (b) approving the E/B Settlement Agreement, including the releases to be delivered in connection therewith (as described further herein);
    - (c) approving the September 5 Interim R&D; and

- (d) approving the fees and disbursements of the Receiver and TDS in the amounts set out in this Seventh Report.

### III. TERMS OF REFERENCE

24. In preparing this Seventh 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 and / or directors, legal counsel to Mr. Peter Nygard 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 the Sixth 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.
25. The Receiver has prepared this Seventh Report in its capacity as a Court-appointed officer solely for the purposes described herein. Parties using this Seventh 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.
26. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Receivership Order.
27. Unless otherwise noted, all monetary amounts contained in this Seventh Report are expressed in Canadian dollars.

### IV. ACTIVITIES OF THE RECEIVER

28. The actions / activities of the Receiver since the commencement of the Receivership Proceedings to August 3, 2020 are detailed in the First Report, the Second Report, the Third Report and the Sixth Report. Subsequent to the filing of the Sixth Report, the Receiver's activities, certain of which are reported on in further detail later in this Seventh 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 employees of the Debtors;
- (e) liaising with Service Canada on claims submitted by former employees of NIP pursuant to the *Wage Earner Protection Program Act* (“**WEPPA**”);
- (f) corresponding with current and former employees of NIP regarding the status of claims and payments under WEPPA;
- (g) communicating with Canada Revenue Agency in connection with its requests to conduct an audit of the Nygard Group’s payroll remittance and other tax accounts;
- (h) 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;
- (i) communicating with certain suppliers to coordinate the repossession of goods received in accordance with section 81.1(1) of the BIA;
- (j) 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, including requests for access to and searches for certain information / documentation purportedly under or subject to the control of the Receiver, requests for access to certain premises, removal of purported personal property located at the Debtors’ real property, including the Toronto Property and 1771 Inkster Boulevard (Winnipeg) (the “**Inkster Property**”), matters related to the scope of the Receivership Order and other matters;
- (k) communicating with counsel to the Gardena Landlords, Peter Nygard and other members of the Nygard Organizati in connection with the Gardena Motion and the E/B Settlement Agreement;
- (l) communicating with counsel to certain landlords regarding the Liquidation Sale and the Landlord Terms Order;
- (m) communicating with the Lenders and their counsel, either directly or through TDS and Katten, in connection with the funding and other aspects of the Receivership Proceedings;
- (n) communicating extensively with TDS and Katten in connection with the Receivership Proceedings and the Chapter 15 Proceedings;
- (o) responding to the subpoenas issued to Nygard Inc. by the Grand Jury, Southern District of New York;

- (p) communicating extensively with the Consultant and counsel in connection with matters relating to the collection of accounts receivable, the sale of the intellectual property, the disposition of wholesale inventory in the US, and the Liquidation Sale;
- (q) attending to various litigation matters in Canada and the US;
- (r) attending to matters related to recovery of payroll funds subject to court-ordered reimbursement, and certain utilities charges on the Debtors' corporate credit card facility;
- (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) investigating the interests of NPL in certain real property located at Falcon Lake, Manitoba described as Lot 15 Block 11 Plan 1903 Falcon Lake (leased pursuant to Manitoba Crown Lands and Property Agency Lease No. PVHL 66978) and Lot 17 Block 11 Plan 1903 Falcon Lake (leased pursuant to Manitoba Crown Lands and Property Agency Lease No. PVHL 5208) and the buildings and structures affixed thereto (collectively, the "**Falcon Lake Property**");
- (u) investigating the interests of NPL in certain real property located at 40 Fieldstone Drive, Vaughan, Ontario (the "**Fieldstone Property**");
- (v) continuing to address the matter of the recovery of electronic files deleted through the use of the accounts of certain (now former) Nygard Group employees on the date of, or following the commencement of proceedings for, the appointment of the Receiver;
- (w) communicating with the purchaser of the Toronto Property, and CBRE Limited with respect to various closing matters and completing the closing of the sale of the Toronto Property;
- (x) communicating with Colliers International and TDS with respect to the sale and marketing of the Inkster Property and Nygard Group's real property located 702-708 Broadway Avenue in Winnipeg, Manitoba;
- (y) monitoring the Debtors' cash receipts and disbursements, and providing funding to the Debtors to pay their post-filing obligations as set out herein;
- (z) recording receipts and disbursements, including the preparation of the September 5 Interim R&D;
- (aa) preparing this Seventh Report; and
- (bb) other matters in connection with the administration of the Receivership Proceedings.

## The Liquidation Sale

29. As at the date of the Seventh Report, the Receiver had vacated, on behalf of the Debtors, 28 of the Nygard Group's retail stores while the Liquidation Sale continues in the Debtors' remaining 137 retail stores.
30. As at the date of the Seventh Report, the Receiver delivered, on behalf of the Debtors, notices of repudiation in accordance with the terms of the Landlord Terms Order to the landlords of an additional 115 of the Debtor's retail stores with effective surrender dates throughout September, 2020.
31. The current status of the Nygard Group retail locations is summarized in the below chart:

Status of Canadian Retail Store Repudiation Notices			
	Store Closed	Repudiation Notice Sent	Not Repudiated
Alberta	4	19	
British Columbia	3	13	
Manitoba	1	6	1
New Brunswick	2	4	
Newfoundland	1	5	
Nova Scotia	2	11	
Ontario	12	16	45
Prince Edward Island		2	
Quebec	3	4	3
Saskatchewan		8	
<b>Total</b>	<b>28</b>	<b>88</b>	<b>49</b>

Note: The Debtors have closed one retail store located within the Notre Dame Property.

32. The Receiver currently anticipates that all retail stores will be closed by the end of September, 2020, in accordance with the Landlord Terms Order.

## The Toronto Property

33. As noted above, on August 10, 2020, the Manitoba Court made the Niagara Approval and Vesting Order approving, among other things, the sale of the Toronto Property. Pursuant to the offer to purchase (the "**Niagara Agreement**") for the Toronto Property, closing was to occur fifteen (15) days immediately following the date of the Niagara Approval and Vesting Order.
34. On August 25, 2020, the purchaser of the Toronto Property paid the balance of the purchase price to TDS. On August 28, 2020, upon completion of registration at the Land Registry Office in Ontario, the sale of the Toronto Property closed and the net proceeds from the transaction were released to the Receiver. On September 2, 2020, after retention of appropriate amounts to address Potential Priority Claims (as defined hereinafter) and the ongoing funding

of the Receivership Proceedings, the Receiver released the balance of the proceeds from the sale of the Toronto Property to repay outstanding Receiver's Borrowings, as detailed later in this Seventh Report.

## V. INTERIM STATEMENT OF RECEIPTS AND DISBURSEMENTS

35. The September 5 Interim R&D is summarized as follows:

Nygard Group		
Interim Statement of Receipts and Disbursements		
For the Period March 18, 2020 - September 5, 2020		
		(\$CAD)
<i>(in 000s)</i>		
		Notes
<b>Cash on Hand - March 18</b>	<b>73</b>	1
<b>Receipts</b>		
Accounts Receivable, Real Estate and Other Collections	36,551	2
Sales Receipts	38,604	3
Receiver's Borrowings	30,082	4
<b>Total Receipts</b>	<b>105,237</b>	
<b>Disbursements</b>		
Payroll	9,938	5
Rent	5,271	6
Utilities / Operating Expenses / Other	1,835	
Insurance	834	7
Postage / Courier / Logistics Providers	1,288	8
Asset Protection Services	319	9
Chargebacks / Returns / Bank Fees	343	10
Consultant Fees	2,304	11
Professional Fees	4,123	12
Receivers' Sales Taxes	332	13
Debtors' Sales Taxes	2,414	14
<b>Total Disbursements</b>	<b>29,001</b>	
<b>Excess of Receipts over Disbursements</b>	<b>76,236</b>	
Distribution to Lenders	(67,087)	15
<b>Cash on Hand - September 5</b>	<b>9,222</b>	
<b>Notes:</b>		
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 to Dillard's, the sale of real estate, and other miscellaneous receipts. Certain amounts collected after April 30, 2020 are subject to a fee by Hilco.		
3 Represents receipt 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 and benefits paid to the Debtors' employees, as well as employee health and dental benefits. Includes pre-filing wages paid to the Debtors' current and former employees.		
6 Represents rent paid to landlords in accordance with the Landlord Terms Order and rent paid to a distribution centre located in Woodbridge, Ontario.		
7 Payment of insurance premiums since the Appointment Date including annual premiums for the period ending May 31, 2021 and June 30, 2021.		
8 Represents deposits and payments paid to logistics providers for the transport of goods.		
9 Represents costs incurred for security services at various Debtors' locations.		
10 Represents bank charges, credit card chargebacks and related amounts.		
11 Represents fees and expenses paid to the Consultant in accordance with the Consulting and Marketing Agreement.		
12 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.		
13 Consists of net sales taxes paid on disbursement by the Receiver. This amount excludes sales taxes paid on disbursements by the Debtors.		
14 Consists of sales taxes paid by the Debtors after the Appointment Date.		
15 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. Balance 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. Balance also includes \$0.7 million in fees relating to the Lender's Holdback as provided for pursuant to the Receiver Term Sheet.		

36. The Receiver noted the following in connection with the September 5 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 March 9 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 at BMO two (2) additional estate accounts (the "**Estate Accounts**", and together with the BMO Accounts and the BOA Accounts, the "**Receivership Accounts**"). As discussed below, on September 4, 2020, the Receiver altered the Cash Management System such that all future proceeds from the Property will accumulate in the Receivership Accounts. The 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 September 5 Interim R&D, receipts totaled approximately \$105.2 million, comprised of approximately \$36.5 million related to the collection of accounts receivable, real estate sales, wholesale inventory, IP sales, building sales and other miscellaneous receipts, \$38.6 million related to the collection of retail store, e-commerce and FF&E sales, and \$30.1 million related to the Receiver's Borrowings;
- (c) disbursements during the period of the September 5 Interim R&D, totaled approximately \$29.0 million and primarily consisted of payroll and source deductions, rent, operating disbursements and professional fees; and
- (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 \$67.1 million, were distributed to the Lenders.

## The Credit Facility

37. As noted in the First Report, the Lenders are the Nygard Group's primary secured creditors pursuant to the Credit Agreement. As at the Appointment Date, the Nygard Group's secured obligations to the Lenders under the Credit Agreement totaled approximately USD\$25 million (CDN\$36 million) (the "**Credit Facility Indebtedness**"). The Lenders provided the Receiver with a detailed listing of all of the transactions that comprise the Credit Facility Indebtedness between January 3, 2020, the date of the initial advance made to the Debtors, and March 18, 2020, summarized as follows:

<b>Nygar Group</b>	
<b>Summary of Credit Facility Indebtedness</b>	
<b>As at March 18, 2020</b>	
<i>(in 000's)</i>	
	<b>Amount (USD)</b>
Advances	40.3
Lenders' Closing Fee	0.6
Closing Professional Fees	1.4
Lenders' Monitoring and Enforcement Fees	1.5
Lenders' Early Termination Fee	1.2
Interest and Other Fees	0.5
Paydowns	(20.6)
	<u>24.9</u>

38. The Receiver notes the following in connection with the Credit Facility Indebtedness:
- (a) the USD\$40.3 million in Advances represents the aggregate of the weekly funding requests made by the Debtors to the Lenders pursuant to the Credit Agreement. The Receiver notes the initial advance made on January 3, 2020 represents approximately USD\$21.2 million of the total advances;
  - (b) pursuant to the provisions of the Credit Agreement, the Lenders were entitled to a USD\$0.6 million fee upon closing of the Credit Agreement, representing 1.5% of the aggregate revolving commitment of USD\$40 million (the "**Aggregate Revolving Commitment**");
  - (c) the USD\$1.4 million in Closing Professional Fees represents the total fees paid to legal, financial and other advisors of the Debtors and the Lenders involved in the closing of the Credit Agreement. The Receiver understands these amounts were funded and paid to the various advisors as part of the initial advance under the Credit Facility;
  - (d) the USD\$1.5 million in Lenders' Monitoring and Enforcement Fees represents the total legal and financial advisor fees incurred by the Lenders, as a result of the Debtors' various defaults under the Credit Agreement (as described extensively in the Affidavit of Robert Dean affirmed March 9, 2020), up to March 18, 2020.

Pursuant to the provisions of the Credit Agreement, the Lenders are entitled to a recovery of any professional fees and expenses incurred relating to monitoring and enforcement activities;

- (e) the USD\$1.2 million of the Credit Facility Indebtedness resulted from early termination fees (the “**Termination Fees**”) charged by the Lenders to the Debtors, which Termination Fees represent 3% of the Aggregate Revolving Commitment and were due and payable on February 26, 2020 when the Lenders delivered to the Debtors a demand for repayment and Notice of Intention to Enforce Security pursuant to the BIA for repayment of the Credit Facility Indebtedness. TDS has reviewed the Credit Agreement and confirmed that the Termination Fees were charged in accordance with the terms of the Credit Agreement;
  - (f) approximately USD\$0.5 million in interest incurred on the outstanding balances under the Credit Facility. The Receiver notes interest was charged at a variable interest rates ranging from 7.328% to 9.236% per annum in accordance with the provisions of the Credit Agreement; and
  - (g) the USD\$20.6 million in Paydowns represents the aggregate of the cash receipts received by the Debtors between January 3, 2020 and March 18, 2020 and swept to the Lenders’ accounts as part of the Cash Management System.
39. The Receiver has reviewed the Nygard Group’s internal, unaudited financial statements and confirms that the amounts claimed to be owed by the Lenders are consistent with the Debtors’ internal financial records. The Receiver also performed certain limited testing procedures on the amounts comprising the Credit Facility Indebtedness and, based on the Receiver’s review, it appears that the amounts owing under that Credit Facility have been properly charged in accordance with the Credit Agreement.
40. As noted in the First Report, TDS has undertaken a review of the Credit Agreement and other associated documents (collectively, the “**Lenders’ Security**”) in the jurisdictions in which the Nygard Group has retail operations or other Property and has provided the Receiver with a legal opinion in respect of the Province of Manitoba and agent opinions from local counsel in the Provinces of British Columbia, Alberta, Saskatchewan, Ontario, Quebec, Prince Edward Island, Nova Scotia, New Brunswick, and Newfoundland & Labrador, which conclude, subject to the standard qualifications and limitations, that the Lenders’ Security is valid and registered in all such Provinces, which are the Provinces in which the Nygard Group has retail operations or other Property known to the Receiver. The Receiver has also received a legal opinion from Katten similarly concluding that the Lenders’ Security is valid and registered in the states of New York, Delaware, and California.
41. 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, proceeds from the Property were distributed to the Lenders subsequent to the Appointment Date on a regular basis as repayment of the Credit Facility,

and subsequently as repayment of the Receiver's Borrowings. On or about July 27, 2020, Credit Facility Indebtedness, plus accrued interest, was paid in full.

42. The Receiver notes the Agent has claimed an additional USD\$0.7 million may still be owing by the Debtors under the Credit Facility for foreign exchange rate inconsistencies and "ledger debt" which, in the Lenders' view, would fall within the scope of "Obligations" as defined in the Credit Agreement. The Receiver has requested the supporting documentation from the Agent and will report further to the Manitoba Court once it has completed its review on these residual amounts.
43. As noted above, upon closing of the Toronto Property sale, the Receiver used a portion of the net proceeds to repay all of the outstanding amounts owing to the Lenders under the Receiver's Borrowings. Due to the timing of receipts, the Receiver notes the Lenders are in receipt of approximately USD\$1.0 million in excess funds and the Receiver and Lenders are currently in discussions on a final reconciliation of the Receiver's Borrowings (including accrued interest, fees, etc). The Lenders have advised the Receiver that any excess funds in their possession, subject to retaining a reserve for the Lenders' ongoing legal costs, will be promptly repaid to the Receiver.
44. Subject to the foregoing, the Receiver notes that all outstanding amounts owing to the Lenders pursuant to the Credit Agreement or Receiver Term Sheet, other than the Lenders' ongoing legal costs and expenses, have been repaid, in full.

### **Funding of Receivership**

45. Subsequent to the date of the Sixth Report, the Receiver and the Lenders reached an agreement regarding the distribution and use of the proceeds generated from the Toronto Property and remaining Property, as follows:
  - (a) the Receiver would withhold a total of \$6.1 million from the net proceeds received from the Toronto Property sale to address such matters as (i) potential claims that could rank in priority to the secured claims of the Lenders as against the Property, or the proceeds therefrom, and (ii) the ongoing funding of the expenses and obligations of the receivership after completion of the Liquidation Sale. The balance of the proceeds from the Toronto Property sale would be remitted to the Lenders to repay the Receiver's Borrowings;
  - (b) the Cash Management System, and specifically the cash sweep mechanism to the Lenders, would remain in place until repayment of the Receiver's Borrowings;
  - (c) upon repayment of the Credit Facility and the Receiver's Borrowings, (i) the Receiver would terminate the cash sweep such that all proceeds from the Property would accumulate in the Receivership Accounts and

- (ii) the Lenders would terminate the Receiver Term Sheet (as defined in the Receivership Order) such that the Lenders would have no further funding obligations; and
  - (d) the Receiver would fund a \$1 million reserve in favour of the Lenders, if necessary, on account the indemnity obligations (the “**Lender Indemnity**”) contained in the Credit Agreement covered by the Lenders’ security and referred to in the Sixth Report.
46. On September 4, 2020, the Receiver made arrangements to alter the Cash Management System such that all future proceeds from the Property would accumulate in the Receivership Accounts as opposed to being swept to the Lenders.

## **VI. E/B SETTLEMENT AGREEMENT**

47. The Debtors carried on business and stored Property at certain leased real property located in Gardena, California (the “**California Properties**”) as follows:
- (a) 312 & 332 East Rosecrans Avenue, Gardena, California (owned by Brause);
  - (b) 14401 South San Pedro Street, Gardena, California (owned by Edson’s); and
  - (c) 14421 South San Pedro Street, Gardena, California (owned by Edson’s).
48. As detailed in the Fifth Report, the Gardena Landlords have made certain claims (the “**California Property Claims**”) regarding the payment of rent and other costs from the Receiver respecting the use by Nygard Inc. and/or the Receiver (as the case may be) of the California Properties as generally described in the affidavit of Greg Fenske dated May 13, 2020 filed in the Receivership Proceedings. The Receiver denies any responsibility for the California Property Claims.
49. The Receiver has made claims (the “**Payroll Funds Claims**”) for the repayment or reimbursement by Edson’s of certain payroll funds (“**Payroll Funds**”) as described in a letter from TDS to the Gardena Landlords’ counsel, dated June 26, 2020, a copy of which was attached as Appendix “E” to the Supplementary Third Report, and pursuant to an undertaking to the Manitoba Court on March 12, 2020, an Order of the Manitoba Court made March 13, 2020 and the General Order.
50. The Receiver has also made claims (the “**Utility Payment Claims**” and together with the California Property Claims and the Payroll Funds Claims, the “**Financial Claims**”) for the payment or reimbursement by Edson’s of certain utility payments as described in a letter from TDS to the Gardena Landlords’ counsel dated July 6, 2020, a copy of which

was attached as Appendix "I" to the Fifth Report. The Gardena Landlords deny any responsibility for the Payroll Fund Claims and the Utility Payment Claims.

51. In connection with the settlement of the Financial Claims described below, the Receiver, the Gardena Landlords, the Lenders, NPL, Peter Nygard and other members of the Nygard Organization have agreed to settle and release certain other claims and matters for the benefit of the parties and the Receivership Proceedings generally pursuant to the E/B Settlement Agreement. A copy of the E/B Settlement Agreement, redacted for pricing and other sensitive commercial information, is attached hereto as **Appendix "A"**.
52. The key terms of the E/B Settlement Agreement include:
- (a) the Financial Claims shall be settled by a net payment (the "**Settlement Amount**") from the Gardena Landlords to the Receiver on or before the Closing Date (as hereinafter defined);
  - (b) Nygard, Inc. and/or the Receiver, as the case may be, shall have cost-free access and use of the California Properties up to and including September 30, 2020 (the "**Initial Use Period**"). The Initial Use Period may be extended by Nygard, Inc. and/or the Receiver in respect of some or all of the California Properties by a period of up to 30 days (the "**Additional Period**") provided that Nygard, Inc. shall be required to pay rent and other usual lease costs (on a prorated basis) for the Additional Period. In the event of the imposition of COVID-19 related restrictions that for a period of time (the "**Restriction Period**") prevent, restrict or in any way interfere with the ability of Nygard, Inc. and/or the Receiver, as the case may be, to sell and distribute inventory located at the California Properties, the Initial Use Period shall be extended cost-free on a day for day basis matching the number of days of the Restriction Period;
  - (c) Nygard, Inc. and/or the Receiver, as the case may be, shall surrender possession of the California Properties on the later of the end of the Initial Use Period and the Additional Period (the "**Exit Date**");
  - (d) the Receiver shall be entitled, without cost, to abandon and leave in the California Properties all documents, other physical records and other property located therein at the Exit Date, and surrender the California Properties in "as is" condition, subject to such arrangements as may be required to be made with the SDNY (as hereinafter defined) for the preservation of such documents and physical records;
  - (e) the Gardena Landlords shall purchase from the Consultant, as agent for the Receiver, any unsold inventory (the "**Purchased Inventory**"), including private label inventory, remaining at the California Properties on the Exit Date, up to a maximum aggregate cap. The Purchased Inventory is being sold to the Gardena Landlords on an "as is, where is" basis without any representation or warranty of any kind from the Receiver;

- (f) the Receiver acknowledges that the Fieldstone Property owned by NPL does not constitute Property as defined in the Receivership Order. The Receiver further confirms it has been advised that NPL shall grant a real property mortgage over the Fieldstone Property to the Gardena Landlords specifically in connection with its funding of the Settlement Amount; and
  - (g) the Receiver acknowledges that Falcon Lake Property leased to NPL was not intended to be included as collateral securing repayment and other obligations of the Debtors pursuant to the Credit Agreement, and accordingly is not treated as Property for the purposes of the Receivership Order. The Receiver further confirms it has been advised that NPL shall provide a real property mortgage over the Falcon Lake Property to the Gardena Landlords specifically in connection with its funding of the Settlement Amount.
53. The E/B Settlement Agreement, and the performance of the respective obligations of the parties thereunder, are subject to:
- (a) the execution and delivery on the Closing Date of (i) certain releases between Peter Nygard, the Debtors and others, and the Lenders, (ii) mutual releases between the Gardena Landlords and the Receiver, and (iii) a release of Peter Nygard in favour of the Receiver (collectively, the “**Releases**”, each of which is attached to the E/B Settlement Agreement attached hereto as **Appendix “A”**), to compromise and settle between themselves all claims or potential claims between them, known, contingent or unknown currently existing or that may exist in the future, including matters relating in any matter whatsoever to the Credit Agreement, the Canadian Proceedings and the Chapter 15 Proceedings;
  - (b) on or before September 14, 2020, the Manitoba Court shall have made an order (the “**NOI Annulment Order**”), approving, among other things:
    - (i) the withdrawal of, or alternatively authorizing the Canadian Debtors to withdraw from, the proposal proceedings (the “**NOI Proceedings**”) commenced by the Canadian Debtors on March 9, 2020, without prejudice to the ability of the Canadian Debtors, or any of them, to seek to commence in the future fresh proposal proceedings under the BIA;
    - (ii) that the withdrawal of (or from) the NOI Proceedings shall not be considered a deemed assignment into bankruptcy of all or any of the Canadian Debtors;
    - (iii) the discharge of A. Farber & Partners Inc. (“Farber”) as Proposal Trustee in the NOI Proceedings, without further obligation or liability in respect thereof; and

- (iv) directing Farber to promptly pay the full balance of any retainer amount provided by Edson's in accordance with the terms set forth in the E/B Settlement Agreement.
  - (c) concurrently therewith, the Manitoba Court making an order (the "**E/B Settlement Approval Order**") approving the E/B Settlement Agreement, including the Releases, on terms satisfactory to Gardena Landlords, the Lenders and the Receiver; and
  - (d) the making of an order in the Chapter 15 Proceedings recognizing, and giving effect in the United States to, the E/B Settlement Approval Order, on terms satisfactory to the Receiver.
54. Each of counsel for the Receiver, Lenders, Gardena Landlords, Peter Nygard and the Debtors is currently holding copies of the fully executed Releases, in escrow pending closing of the transactions contemplated by the E/B Settlement Agreement.
55. The transactions contemplated by the E/B Settlement Agreement (including, without limitation, the payment of the Settlement Amount, the delivery of the Releases and the purchase of the Purchased Inventory) shall close at 2:00 p.m. PST on the date (the "**Closing Date**") on which possession of the last of the California Properties is surrendered to the Gardena Landlords.
56. An unredacted copy of the E/B Settlement Agreement has been filed separately with the Manitoba Court as **Confidential Appendix "1"**. The Receiver considers that the disclosure of the pricing and other commercially sensitive information detailed in the unredacted E/B Settlement Agreement, including information in respect the Purchased Inventory, would be detrimental to the interests of the Receiver in maximizing the outcome of the Receivership Proceedings. Accordingly, the Receiver requests that the E/B Settlement Agreement be sealed until further order of the Manitoba Court.
57. The Receiver was actively involved in the negotiation of the E/B Settlement Agreement and is of the view that the E/B Settlement Agreement and the Settlement Amount are fair and reasonable in the circumstances, and are of substantial benefit to the stakeholders of the Nygard Group. Absent such settlement, the parties were facing time-consuming and costly litigation before the Manitoba Court, and potentially the US Court, in order to address and seek enforcement of the Financial Claims. Further, the E/B Settlement Agreement will facilitate the distribution of proceeds to creditors other than the Lenders as it is expected that the exchange of releases contemplated thereunder will eliminate any requirement of the Lenders that proceeds from the disposition of Property be held by the Receiver going forward as security for the Lender Indemnity for a period which may extend until the expiration of applicable limitation periods for claims and causes of action intended to be indemnified. In summary, Court approval of the E/B Settlement Agreement and the related releases will bring an end to a significant amount of litigation in the

Receivership Proceedings, result in additional funds in the estate and provide the Receiver, as a Court Officer, the certainty required to complete remaining realizations and distributions for the benefit of all stakeholders.

## VII. UPDATE ON THE CHAPTER 15 PROCEEDINGS

58. On or about February 25, 2020, the United States District Court for the Southern District of New York (“SDNY”) issued a Grand Jury subpoena (the “**Feb 25 Subpoena**”) to Nygard, Inc., commanding the production of a wide range of documents and electronic files, to be produced by March 13, 2020. On August 4, 2020, the SDNY issued another Grand Jury subpoena (the “**Aug 4 Subpoena**” and together with the Feb 25 Subpoena, the “**Grand Jury Subpoenas**”) to Nygard, Inc., which was delivered to Katten on behalf of the Receiver, commanding the production of additional documentation by August 25, 2020.
59. On April 29, 2020, the Manitoba Court made the DEFA Order, which establishes, *inter alia*:
- (a) a protocol and process for allowing access, subject to certain conditions, to physical and electronic records in or subject to the possession and/or control of the Receiver;
  - (b) authorizes the Receiver to produce documents in its possession and/or control subject to a Production Requirement in a Production Case (each defined therein) provided that the Receiver provides notice of such Production Requirement to non-Debtor members of the Nygard organization or directors, officers and employees of the Nygard Group, as applicable, prior to making such disclosure or production; and
  - (c) a procedure for circumstances when the Receiver intends to expressly waive the solicitor-client privilege (or any similar privilege or doctrine in any jurisdiction in which the Debtors have records) as to the Debtors in any Production Case involving one or more of the Debtors.
60. In making the DEFA Order, the Manitoba Court recognized that it has no jurisdiction or ability to change the production obligations of the Receiver as prescribed by United States law in relation to the Grand Jury Subpoenas, or purport to relieve the Receiver from producing documents and other materials in response thereto. Further, the DEFA Order gave the Receiver the authority to address matters of production, and related matters of privilege, so that the Receiver could meet its legal obligations in Canada and other jurisdictions to produce documents as may be required by law, without its ability to do so being fettered, controlled or jeopardized by the interests of other parties.
61. On September 2, 2020, the Debtors filed a motion (the “**DEFA Motion**”) with the US Court seeking an order recognizing and enforcing the DEFA Order in the Chapter 15 Proceedings and in the United States, and compelling the Receiver to comply with the terms thereof. The DEFA Motion is scheduled to be heard by the US Court on September 23, 2020.

62. In the DEFA Motion, the Debtors assert that the Receiver has refused to comply with the terms of the DEFA Order by producing documents to the SDNY in response to “a Grand Jury subpoena related to one or more of the Debtors (or its officers, directors or shareholders), waiving applicable privileges, without providing the Debtors with notice and opportunity to object to such production”. A copy of the DEFA Motion is attached hereto as **Appendix “B”**.
63. In the Receiver’s view, the DEFA Motion is without merit and omits several important relevant facts, namely that arrangements for the process of the production of documents by the Receiver to the SDNY in response to the Feb 25 Subpoena, were the subject of numerous discussions and communications among Katten, US counsel of record for Mr. Nygard, Morvillo Abramowitz Grand Iason & Anello PC (“**Morvillo**”), and the SDNY. The Receiver notes that Levene Tadman Golub LLP (“**LTG**”) and Lerner’s LLP (“**Lerner’s**”), Canadian counsel for Mr. Nygard, the Debtors, and/or the Gardena Landlords were aware of those discussions and communications, and communicated directly with Morvillo in respect thereof. Further, the efforts of the Receiver pursuant to paragraph 4 of the DEFA Order to make Feb 25 Subpoena production arrangements were also the subject of discussions among TDS, LTG and Lerner’s.
64. The Receiver notes that Morvillo, LTG, and Lerner’s were made aware that the Receiver intended to produce documents responsive to the Feb 25 Subpoena to the SDNY, using the process agreed to among Morvillo, Katten and the SDNY on June 10, 2020. They were also aware that a taint team would review the documents and that there would be an opportunity for privilege claims to be made. No objection has been made to that ongoing process until now.
65. The Receiver intends to file a response to the DEFA Motion with the US Court on or before September 16, 2020 and will report further to the Manitoba Court on the outcome of the September 23, 2020 hearing with the US Court.

### **VIII. PROFESSIONAL FEES AND DISBURSEMENTS**

66. 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.
67. 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.
68. 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.

69. 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.
70. Summaries of the accounts of the Receiver for the period July 27, 2020 to August 30, 2020 and of TDS for the period from July 20, 2020 to August 30, 2020 are attached hereto as **Appendix "C"**. 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 "D"**.
71. The Receiver and TDS have maintained detailed records of their professional time and disbursements incurred in connection with the Nygard Group receivership proceedings.
72. 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.
73. The Receiver's professional fees incurred for services rendered from July 27, 2020 to August 30, 2020 amount to \$334,684.25, plus disbursements in the amount of \$16,914.15 (each excluding applicable taxes).
74. The fees of the Receiver's counsel, TDS, for services rendered from July 20, 2020 to August 30, 2020 total \$193,074.50 plus disbursements in the amount of \$8,785.41 (each excluding applicable taxes).
75. The Receiver has reviewed the accounts of TDS and confirms that the services reflected therein have been duly authorized and rendered and that, in the Receiver's opinion, the charges are reasonable.

## **IX. CONCLUSIONS**

76. In consideration of all of the above, the Receiver respectfully requests that the Manitoba Court make an Order:
  - (a) approving this Seventh Report and the actions / activities of the Receiver described herein;
  - (b) approving the September 5 Interim R&D;
  - (c) approving the E/B Settlement Agreement; and
  - (d) approving the professional fees and disbursements of the Receiver and TDS in the amounts set out in this Seventh Report.

All of which is respectfully submitted on this 10<sup>th</sup> day of September, 2020.

**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., any Nygard International Partnership  
and not in its personal capacity



---

Adam Sherman, MBA, CIRP, LIT



---

Pritesh Patel, MBA, CFA, CIRP, LIT

## **APPENDIX D**

IN THE COURT OF QUEEN'S BENCH FOR MANITOBA  
JUDICIAL CENTRE OF WINNIPEG

BETWEEN

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant

and

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC.,  
FASHION VENTURES, INC., NYGARD NY RETAIL, LLC,  
4093879 CANADA LTD., 4093887 CANADA LTD., NYGARD INTERNATIONAL  
PARTNERSHIP, NYGARD PROPERTIES LTD., AND NYGARD ENTERPRISES  
LTD.,

Respondents

---

REASONS FOR JUDGMENT

(Excerpt)

(Pages T1 - T11)

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June 2, 2020

Winnipeg, Manitoba

Royal Reporting, A Veritext Company

120 - 330 St. Mary Avenue

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4 June 2, 2020

Afternoon Session

5

6 The Honourable Mr. Justice

The Court of Queen's Bench

7 J. Edmond

for Manitoba

8

9 J. Dacks (by telephone)

For the Applicant

10 C. Howden (by telephone)

For the Applicant

11 W. Onchulenko (by telephone)

For the Respondents

12 D. Magisano (by telephone)

For the Respondents

13 B. Taylor (by telephone)

For Richter Advisory Group Inc.

14 R. McFadyen (by telephone)

For Richter Advisory Group Inc.

15 M. LaBossiere (by telephone)

For Richter Advisory Group Inc.

16 (Articling Student-at-Law)

17 P. Patel (by telephone)

For Richter Advisory Group Inc.

18 A. Sherman (by telephone)

For Richter Advisory Group Inc.

19 E. Finley (by telephone)

For Richter Advisory Group Inc.

20 L. Galessiere (by telephone)

For various Landlords

21 J. Wuthmann (by telephone)

For various Landlords

22 M. Citak (by telephone)

For Oxford Properties Group and

23

Crombie REITT

24 V. DaRe (by telephone)

For Doral Holdings Limited and

25

KCAP Kingston Inc.

26 J. Sokal (by telephone)

For MLT Aikins LLP

27 D. Ulmann (by telephone)

For Tiina Tulikorpi

28 K. Pohorily

Court Clerk

29

30

31 **Reasons for Judgment**

32

33 THE COURT:

All right. Well, I Am prepared to give my

34 reasons for decision orally today with respect to the motion. I reserve the right to --

35 if a copy of the transcript is ordered, reserve the right to make some edits to the oral

36 decision for grammatical or clarification purposes but not anything substantive.

37

38 So just by way of background, the terms that will be used in these reasons for

39 decision are as defined in the receivership order which was granted March 18, 2020,

40 and the sale approval order.

41

1 Richter Advisory Group Inc. is the court-appointed receiver (the “Receiver”)  
2 pursuant to the receivership order. On April 29, 2020, the Court granted the Sale  
3 Approval Order.  
4

5 Paragraph 10 of the Sale Approval Order provides that the sale of merchandise and  
6 furniture, fixtures, and equipment (“FF&E”) in stores as defined in the sale approval  
7 order shall not commence until further order of the Court. The Receiver filed a  
8 motion returnable June 1st, 2020, seeking an order substantially in the form attached  
9 as Schedule A to the notice of motion (the “Landlord Terms Order”).  
10

11 The Landlord Terms Order sets out specific agreed terms that have been negotiated  
12 with numerous landlords of the stores that were occupied by one or more of the  
13 respondents. The terms address the sale of the retail inventory and FF&E at the store  
14 locations leased to one or more of the respondents.  
15

16 The Receiver seeks an order granting a charge (the “landlords’ charge”) over the  
17 property as defined in the receivership order in favour of the landlords to secure the  
18 payment of monies for any unpaid rent for the period commencing March 18, 2020,  
19 up to and including the repudiation date of a lease. I reserved my decision on this  
20 issue because the briefs were received on Sunday, May 31st, 2020, the day before  
21 the hearing, and I required additional time to review the authorities before ruling on  
22 the Receiver’s request.  
23

24 The Sale Approval Order approved the liquidation process generally. Paragraph 10  
25 provides that the sale of merchandise and the FF&E in the store shall not commence  
26 until further order of the Court as to:

- 27 (a) the sale commencement date, the sale termination date, and/or the  
28 duration of the sale;
- 29 (b) the payment of rent in respect of the sale term;
- 30 (c) the payment of rent, if any, in respect of the period from March 18,  
31 2020, to the sale commencement date;
- 32 (d) the timing of delivery and period of notice of repudiation in relation  
33 to the store leases;
- 34 (e) the prescription, if any, of limits on the augmentation of merchandise  
35 to the stores for the purpose of the sale; and (f) such other matters as may  
36 be required. (the “Landlord Terms”)  
37

38 The Receiver’s second report provides details of the steps taken to work with the  
39 consultant to develop the landlord terms which address the realities being  
40 experienced by Canadian tenants and landlords as a result of the COVID-19  
41 pandemic. The landlord terms reflect the fact that government regulations differ

1 across Canada and some of the stores will be allowed to reopen at different times in  
2 different provinces. I agree that the proposed landlord terms reflect the flexibility  
3 that is required in the circumstances.

4  
5 The Receiver states that the proposed landlord terms will assist in maximizing the  
6 value of the merchandise and the FF&E for the benefit of all stakeholders. The  
7 Receiver states that it is crucial to commence the sale process as soon as reasonably  
8 possible in each jurisdiction in order to bring certainty to these proceedings for the  
9 landlords, the respondents, and the respondents' employees.

10  
11 The landlord developed the proposed Landlord Terms Order in consultation with  
12 counsel for the landlords for more than 60 (out of a total 167) retail store locations  
13 leased by one or more of the respondents.

14  
15 The landlords that made submissions advise the Court that they did not oppose the  
16 Landlord Terms Order. In fact, the Landlord Terms Order was negotiated and  
17 deemed as acceptable by the landlords to recoup what is appropriate and fair in the  
18 circumstances. Ideally, the landlords would be demanding payment of rent and  
19 failure to pay may result in termination of the lease and steps taken to attempt to re-  
20 enter and take possession of the leased premises. Litigating each of the landlord and  
21 tenant disputes would be time consuming and would probably interfere with the sale  
22 process. All landlords have accepted as a second best alternative to the payment of  
23 rent receiving a landlords' charge as security for payment of monies for any unpaid  
24 rent for the period commencing March 18, 2020, up to and including the repudiation  
25 date of a lease as defined in the landlord terms order or otherwise referred to as the  
26 post-filing rent. The landlords' charge shall form a charge on the property in priority  
27 to all security interests, trusts, liens, charges, and encumbrances, statutory or  
28 otherwise, in favour of any person but subordinate to:

- 29  
30 (a) the Receiver's charge and the Receiver's borrowing charge, both as  
31 defined in the receivership order;  
32 (b) any encumbrance in favour of the applicant;  
33 (c) any encumbrance in favour of a secured creditor who would be  
34 materially affected by this order and was not given notice of this motion;  
35 (d) the charges set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the  
36 *Bankruptcy and Insolvency Act Canada*, R.S.C., 1985, c. B-3, ("*BIA*");  
37 (e) any valid claims to the property of the debtors as asserted pursuant to  
38 Section 81.1 of the *BIA*; and  
39 (f) any priority charges which exist in relation to provincial sales tax and  
40 taxes pursuant to the *Excise Tax Act*, R.S.C., 1985, c. E-15.  
41

1 Paragraph 9 of the proposed Landlord Terms Order provides that the landlords'  
2 charge shall be shared by affected landlords rateably in accordance with the amounts  
3 of their respective unpaid post-filing rent and allows for any dispute between the  
4 landlord and the Receiver to be dealt with by this court on a motion made by the  
5 Receiver or the applicable landlord. Paragraph 10 of the proposed Landlord Terms  
6 Order provides that the landlords' charge shall not be enforced without the written  
7 consent of the Receiver or leave of this court.

8  
9 The respondents, Nygard Properties Ltd. ("NPL") and Nygard Enterprises Ltd.  
10 ("NEL") oppose the Receiver's request that the court grant a landlords' charge.

11  
12 The grounds for opposing the creation of a landlords' charge include:

- 13  
14 (a) NEL and NPL are limited recourse guarantors under the credit  
15 agreement. They submit that NEL did not pledge its equity interest in  
16 NPL to the lenders and the credit agreement limits NPL's guarantee for  
17 the debtor's obligations to 20 million U.S. plus costs. This is referenced  
18 in paragraph 2 of the receivership order as amended pursuant to the  
19 general order. NPL and NEL submit that the landlords' charge may revise  
20 the limited recourse guarantor's potential liability and provide the  
21 applicant with more than is set forth in the credit agreement;
- 22 (b) the Receiver has provided insufficient information to the stakeholders  
23 and the court regarding the possible impact of the landlords' charge on  
24 the respondents and the stakeholders; and
- 25 (c) there is no legal basis nor need for the court to create a landlords'  
26 charge. The landlords and Receiver have their rights and obligations as  
27 set out in the receivership order and long-standing case law. To the extent  
28 that the Receiver has occupied the stores, it is responsible to pay rent to  
29 the landlords.

30  
31 The Receiver relies on Section 243 of the *BIA* which it submits confers broad power  
32 on the Court to make wide-ranging orders as the Court considers just and  
33 convenient. Section 243(1) of the *BIA* provides:

34  
35 **Court may appoint receiver**

36 243(1). Subject to subsection (1.1), on application by a  
37 secured creditor, a court may appoint a receiver to do any  
38 or all of the following if it considers it to be just or  
39 convenient to do so:

- 40 (a) take possession of all or substantially all of the  
41 inventory, accounts receivable or other property of an

1 insolvent person or bankrupt that was acquired for or used  
 2 in relation to a business carried on by the insolvent person  
 3 or bankrupt;

4 (b) exercise any control that the court considers advisable  
 5 over that property and over the insolvent person's or  
 6 bankrupt's business; or

7 (c) take any other action that the court considers advisable.  
 8

9 Section 243(1)(c) has been judicially considered in *Third Eye Capital Corporation*  
 10 *v. Dianor Resources Inc.*, 2019, ONCA, 508, 435 D.L.R. (4th) 416. The Ontario  
 11 Court of Appeal interpreted the broad wording of subsection 243(1)(c) as  
 12 "permitting the court to do what justice dictates and practicality demands". (See  
 13 *Third Eye Capital Corporation* at paragraphs 57 and 72)  
 14

15 Further, statements made by the Ontario Court of Appeal in *Third Eye Capital* apply  
 16 in this case as stated in paragraphs 43 and 52:  
 17

18 **43** The *BIA* is remedial legislation and should be given a  
 19 liberal interpretation to facilitate its objectives ...  
 20

21 . . . . .  
 22

23 **52** Such powers were endorsed by judicial interpretation of  
 24 s. 47(2). Notably, in *Canada (Minister of Indian Affairs and*  
 25 *Northern Development) v. Curragh, Inc.*, 1994, 114,  
 26 D.L.R., (4th), 176 (Ont. Ct. (Gen. Div.)) Farley J.  
 27 considered whether the language in s. 47(2)(c) that  
 28 provided that the court could "direct an interim receiver ...  
 29 to ... take such other action as the court considers  
 30 advisable", permitted the court to call for claims against a  
 31 mining asset in the Yukon and bar claims not filed by a  
 32 specific date. He determined that it did. He wrote, at p. 185:  
 33

34 It would appear to me that Parliament did not take  
 35 away any inherent jurisdiction from the Court but in  
 36 fact provided, with these general words, that the  
 37 Court could enlist the services of an interim receiver  
 38 to do not only what "justice dictates" but also what  
 39 "practicality demands". It should be recognized that  
 40 where one is dealing with an insolvency situation  
 41 one is not dealing with matters which are neatly

1 organized and operating under predictable  
2 discipline. Rather the condition of insolvency  
3 usually carries its own internal seeds of chaos,  
4 unpredictability, and instability.  
5

6 The Receiver also relies on relevant sections found in the *Companies' Creditors*  
7 *Arrangement Act*, R.S.C., 1985, c. C-36 ("CCAA"), which expressly deals with  
8 granting a charge on a debtor's property in favour of third parties deemed to be  
9 "critical suppliers".  
10

11 The *BIA* has no express provision granting a charge in favour of critical suppliers.  
12 However, the Receiver submits that it is fair, reasonable, and in the general interest  
13 of stakeholders to invoke the broad jurisdiction under Section 243 to grant the  
14 requested landlords' charge. The Receiver submits that the same consideration  
15 examined by the courts in *CCAA* proceedings ought to apply in this case.  
16

17 Specifically, the Receiver says that the landlords are a critical supplier as the  
18 landlords are required in order to facilitate the sale process and maximize the return  
19 for all stakeholders.  
20

21 The Receiver submits that the criteria set forth in a recent decision, *Soccer Express*  
22 *Trading Corp. (Re)*, 2020 BCSC, 749, [2020] B.C.J. No. 812, at paragraphs 65 and  
23 66, apply equally in this case.  
24

#### 25 Analysis and decision 26

27 It is unnecessary to make a determination as to whether the landlords are a "critical  
28 supplier" in order to grant the relief sought in this case. The *BIA* is remedial  
29 legislation, and it is clear that the court should give it a liberal interpretation to  
30 facilitate its objectives. I agree with the submission of the Receiver that the purpose  
31 of Section 243(1)(c) of the *BIA* is to permit the court to do what justice dictates and  
32 practicality demands. The court has inherent jurisdiction to make orders in the  
33 course of a receivership to do what is fair, reasonable, and just in the circumstances.  
34 As referenced and cited with approval in *Third Eye Capital Corporation* at  
35 paragraph 52, "the condition of insolvency usually carries its own internal seeds of  
36 chaos, unpredictability, and instability".  
37

38 Further, I note the statements of the court in *Residential Warranty Company of*  
39 *Canada Inc. (Re)*, 2006 ABQB, 236, 393 A.R. at paragraph 27, as follows:  
40

41 **27** Solutions to *BIA* concerns require consideration of the

1 realities of commerce and business efficacy. A strictly  
2 legalistic approach is unhelpful in that regard. What is  
3 called for is a pragmatic problem-solving approach which  
4 is flexible enough to deal with the unanticipated problems,  
5 often on a case-by-case basis.  
6

7 The court went on to cite with approval the statements of Mr. Justice Farley in  
8 *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*  
9 which support the submission that s. 243 of the BIA must be interpreted to do not  
10 only what “justice dictates”, but also what “practicality demands”.  
11

12 In my view, the proposed landlord terms are sensitive to the claims being advanced  
13 by landlords as a result of the COVID-19 pandemic. Government regulations across  
14 Canada dictate that retail locations will be opening at different times depending on  
15 the nature and location of the store.  
16

17 The landlords’ charge would entitle the landlord to security for the payment of  
18 monies for unpaid post-filing rent.  
19

20 I am satisfied that the proposed landlords’ charge is fair and just in the circumstances  
21 based on the following:  
22

- 23 (a) the landlords’ charge provides some protection to the landlords who  
24 are currently stayed from prosecuting claims against the respondents or  
25 the property of the respondents pursuant to the receivership order;  
26 (b) the landlords continuing to lease the retail store locations to the  
27 respondents is critical to the liquidation sale process and the ability of the  
28 Receiver and the consultant to carry out the process in an effective and  
29 efficient manner pursuant to the sale approval order;  
30 (c) an interruption in the tenancy at the retail stores will, in all probability,  
31 interfere with the liquidation sale process;  
32 (d) the landlords’ charge may eliminate the prospect of the Receiver  
33 having to respond to motions brought by numerous landlords seeking to  
34 lift the stay and take steps to terminate leases and/or seek immediate  
35 recovery of post-filing rent; and  
36 (e) the applicant, Receiver, consultant and many of the landlords approve  
37 the landlords’ charge and the Landlord Terms Order.  
38

39 The Receiver submits, and I agree, that the Landlord Terms Order:  
40

- 41 (a) is commercially reasonable and fair;

1 (b) offers a level of protection to the landlords in relation to securing  
2 payment of post-filing rent; and  
3 (c) assists in maximizing the value of the retail inventory and the FF&E  
4 for the benefit of all stakeholders during the sale process.  
5

6 In response to the submissions made by the respondents, I do not agree that granting  
7 the landlords' charge would change the terms of the credit agreement or the lenders'  
8 recourse to U.S. 20 million dollars "after all costs and expenses including  
9 enforcement costs". The provisions of the credit agreement limit the priority of the  
10 lenders to proceeds of realization of NPL assets. If amounts in excess of U.S. \$20  
11 million plus costs are collected as a result of the sale of real property and the  
12 liquidation process, the funds realized would be available for other creditors of NPL  
13 in accordance with the receivership order. If the proceeds exceed the limited  
14 recourse amount, the Receiver must determine what other debts and obligations are  
15 owed by the debtor, consider the priority of those claims, and seek further court  
16 authorization to use the balance of the proceeds of realization towards the  
17 satisfaction of the other debts and obligations.  
18

19 I am not satisfied that there is a lack of information to assess and grant the landlords'  
20 charge. Taking some of the steps suggested by the respondents including seeking  
21 government relief under various federal and provincially sponsored COVID-19  
22 programs designed for commercial landlords should not delay this process. While  
23 certain government relief may be available, the landlords will not be in a position to  
24 make the premises available for the liquidation process without an agreement that is  
25 commercially reasonable.  
26

27 Had the respondents not defaulted in payment of their obligations pursuant to the  
28 credit agreement and remained in occupation of the leased premises, it is possible  
29 that landlords may have negotiated agreements to defer a payment of rent to be paid  
30 once the government regulations permitted retail premises to re-open. However, that  
31 did not occur, and the landlords are owed rent, and their cooperation is required and  
32 crucial in these circumstances. In my view, the proposed landlords' charge provides  
33 a mechanism, while not perfect, to allow the liquidation process to proceed with the  
34 cooperation of the landlords.  
35

36 I do not accept the submission of the respondents that there is no legal basis for a  
37 landlords' charge in this case. I agree the circumstances are unique at this time.  
38 However, as stated above, I am satisfied that Section 243 of the *BIA* provides the  
39 Court with the necessary authority to grant an order that the Court considers  
40 advisable in the circumstances.  
41

1 The alternative suggested by the respondents is to have the Receiver seek additional  
2 funding from the lenders to pay the landlords or dispute the landlords' claims. I am  
3 not satisfied that the Receiver should be required to proceed in that fashion. The  
4 Receiver is working cooperatively with the landlords on a solution which balances  
5 the competing interests in an effort to proceed with the sale process fairly and  
6 without delay. I am satisfied the Receiver and the landlords have agreed in the  
7 unique circumstances of the COVID-19 pandemic to a form of security, the  
8 landlords' charge, to address post-filing rent. This will allow the retail inventory sale  
9 and the FF&E sale to proceed as soon as is reasonably possible which, in my view,  
10 will benefit all stakeholders including the respondents.

11

12 Conclusion

13

14 Accordingly, the motion made by the Receiver and specifically the landlord terms  
15 order is approved in the form attached to the notice of motion, document 59 on the  
16 court file.

17

18 That concludes my reasons for decision.

19

20 Any questions?

21

22 MR. TAYLOR: Taylor, My Lord. Thank you, and thank  
23 you for your decision.

24

25 I wonder if in the circumstances of this order, since you've approved it in the form  
26 that's attached to the notice of motion, if we could waive the process of obtaining  
27 consent, as the form, from the various parties that participated in the hearing?

28

29 THE COURT: Ordinarily, that is still required, but I will  
30 hear from others. Given that they had notice already of the form of the order, they  
31 have made submissions on it, and they know what I granted, perhaps that is  
32 appropriate in this case. I will hear from the respondents or from others that may  
33 oppose that if they have an opposition to that point.

34

35 MR. PATEL: My Lord, it's Mr. Patel here. I don't  
36 believe the form of order was -- was circulated by the Receiver, and -- and it appears  
37 that the Court has ordered that it proceed in the form as attached, so I don't -- I don't  
38 believe there's need for further debate on the issue.

39

40 THE COURT: All right. Well, I would not have thought  
41 so either, but anyone else have a submission to make on that point? If not, then, Mr.

1 Taylor and Mr. McFadyen, if you could electronically submit the order in the  
2 appropriate way, I will arrange to have it signed and returned to you through Ms.  
3 Laniuk.

4

5 MR. PATEL: Okay. Thank you for your response, My  
6 Lord.

7

8 MR. MCFADYEN: It's Mr. McFadyen, My Lord. Thank you  
9 for that. I'll submit the order right away. Just for clarity, the only change that I'd  
10 actually make to the form of order is to the preambles to properly reference the  
11 affidavits of service that were filed.

12

13 THE COURT: All right. And you might also add that it  
14 was heard yesterday, but it was put over until today for decision just so that it is  
15 accurate, but that is fine.

16

17 MR. MCFADYEN: Correct. I actually --

18

19 THE COURT: Yes.

20

21 MR. MCFADYEN: Yes, I've made that change to the  
22 preamble too. Thank you, My Lord.

23

24 THE COURT: All right. Good enough. Thank you very  
25 much. Good afternoon.

26

27 \_\_\_\_\_

28

29 EXCERPT CONCLUDED

30 \_\_\_\_\_

T11

IN THE MATTER OF WHITE OAK COMMERCIAL FINANCE, LLC V.  
NYGARD HOLDINGS (USA) LIMITED, NYGARD INC.,  
FASHION VENTURES, INC., NYGARD NY RETAIL, LLC,  
4093879 CANADA LTD., 4093887 CANADA LTD.,  
NYGARD PROPERTIES LTD. AND NYGARD ENTERPRISES LTD.

---

I, KARI SHORT, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Ten (T10), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.

---

COURT TRANSCRIBER

## **APPENDIX E**

---

**From:** Wayne M. Onchulenko <[WOnchulenko@lrglc.ca](mailto:WOnchulenko@lrglc.ca)>  
**Sent:** Tuesday, July 20, 2021 11:36 AM  
**To:** Bruce Taylor <[GBT@tdslaw.com](mailto:GBT@tdslaw.com)>  
**Subject:** Shanghai building

Hi Bruce

Further to our telephone conversation, and in the interests of complete transparency, I advised the company that owns the Shanghai building has accepted an offer to purchase the building and the transaction is in the process of being closed.

We give you this information because, earlier in the proceedings, the Receiver was looking into who owned a building in Shanghai. Our understanding ( and there is no evidence to the contrary) , is that the building is owned by a Chinese company which in turn is owned by a Hong Kong Company which is ultimately owned by Peter Nygard.

Further in Paragraph 156 of the receiver's 12<sup>th</sup> report the receiver takes the position the building has no value based on our representations.

I believe you mean what AGI states in its report at paragraph 92, that the building had no value because it had been seized by the Chinese court to secure payment to former employees and our best estimate was there would be nothing left after the payments were made to the creditors , assuming one could get money out of China. This paragraph also points out that money is owned by the Shanghai company to NPL.

Earlier this year we were advised the court allowed a loan to be arranged ( by the one remaining employee) to pay the employees, using the building as security. We are advised the loan was arranged, the payment made, and court then released its lien on the building.

Efforts were made to sell the building. A buyer was found. The sale price exceeded expectations 19,500,000 Yuan and the amount owed to the employees was less than expected.

In the result, if the transaction is completed , it is expected between 1-2 million dollars will be the approximate net proceeds from the sale.

We are advised there is no way to get the money from China to Canada. Please satisfy yourself accordingly.

**Wayne M Onchulenko\***

**Levene Tadmor Golub**  
LAW CORPORATION

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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# APPENDIX F

COURT OF QUEEN'S BENCH OF MANITOBA  
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., 4093879 CANADA LTD., 4093887 CANADA  
LTD., NYGARD INTERNATIONAL PARTNERSHIP, NYGARD PROPERTIES  
LTD., AND NYGARD ENTERPRISES LTD.

Respondents

---

REASONS FOR JUDGMENT

(Excerpt)

(Pages T1 - T13)

---

November 19, 2020  
Winnipeg, Manitoba

Royal Reporting, A Veritext Company  
120 - 330 St. Mary Avenue  
Winnipeg, Manitoba  
R3C 3Z5  
Phone: 204-306-9149  
Fax: 204-306-9154

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1 Proceedings taken in the Court of Queen's Bench, Winnipeg, Manitoba

2

3

4 November 19, 2020

Afternoon Session

5

6 The Honourable Mr. Justice

The Court of Queen's Bench  
for Manitoba

7 J. Edmond (by telephone)

8

9 C. Howden (by telephone)

For the Applicant

10 J. Dacks (by telephone)

For the Applicant

11 W. Onchulenko (by telephone)

For the Respondent

12 F. Tayar (by telephone)

For the Respondent

13 B. Taylor (by telephone)

For the Receiver

14 M. LaBossiere (by telephone)

For the Receiver

15 A. Sherman (by telephone)

For the Receiver

16 R. McFadyen (by telephone)

For the Receiver

17 P. Patel (by telephone)

For the Receiver

18 T. McElroy (by telephone)

For Albert Gelman Inc.

19 B. Gelman (by telephone)

For Albert Gelman Inc.

20 D. Magisano (by telephone)

For Edson's Investments & Brause  
Investments

21

22 J. Brunell (by telephone)

For a Creditor

23 D. Douglas (by telephone)

For Creditors

24 J. Wuthmann (by telephone)

For Creditors

25 L. Galessiere (by telephone)

For Creditors

26 M. Citak (by telephone)

For Creditors

27 Z. Qureshi (by telephone)

For Creditors

28 K. Pohorily

Court Clerk

29

30

31 **Reasons for Judgment**

32

33 THE COURT:

A number of contested motions were

34 heard last week, on November 9 and 13, 2020.

35

36 And just before I proceed further, I would suggest that all participants mute their  
37 lines so there is no background interference, because if there is background  
38 interference then I may cut out, which is not what parties want to occur.

39

40 A number of contested motions were heard last week on November 9 and 13,  
41 2020, in the ongoing receivership proceedings. I propose to deliver my reasons for

1 decision orally. I accept that the matters raised by the parties are urgent and in the  
2 interests of expediency I am providing the parties with my findings and directions  
3 in a more summary form or as an endorsement.  
4

5 If a copy of the transcript of my reasons for decision is ordered, I reserve the right  
6 to make edits to the oral decision for grammatical or clarification purposes but not  
7 in relation to any substantive matter or issue.  
8

9 By way of introduction, on March 18, 2020, I granted a receivership order, and the  
10 defined terms that I will use in these oral reasons for decision are the defined  
11 terms in that order. Richter Advisory Group Inc. (“Receiver”) is the Court-  
12 appointed Receiver pursuant to the receivership order. The Receiver seeks an order  
13 under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, chapter B-3 as amended  
14 (the “BIA”), in the form attached as schedule A to the notice of motion dated  
15 October 26, 2020.  
16

17 The Receiver seeks the following orders.  
18

19 A. Abridging the time for service of the notice of motion and the materials filed in  
20 support of the motion such that the motion is properly returnable and dispensing  
21 with further service requirements;  
22

23 B. Approving a sale transaction (the “Transaction”) contemplated by an accepted  
24 offer to purchase dated May 21, 2020, as amended by separated amending  
25 agreements dated July 6, 20, August 14, 24, 28, September 17, 25, and 30, 2020  
26 (together, the “Sale Agreement”), between the Receiver as vendor and Eighth  
27 Avenue Acquisitions LTD., or such nominee as designated by Eighth Avenue  
28 Acquisitions LTD as purchaser (“the “Purchaser”);  
29

30 C. Vesting in the Purchaser all of the rights, title, and interest held by Nygard  
31 Properties LTD. (“NPL”), in and to the assets described in the Sale Agreement,  
32 including buildings and fixtures located at 1771 Inkster Boulevard, Winnipeg,  
33 Manitoba, and certain chattels used in connection with the operation carried on at  
34 that property as described in the Sale Agreement (collectively the “Inkster  
35 Property), free and clear of any claims or encumbrances except permitted  
36 encumbrances, all as set out in Inkster Approval Order;  
37

38 D. Sealing the confidential appendices to the ninth report of the Receiver; and  
39

40 E. approving the ninth report and supplementary ninth report of the Receiver, the  
41 conduct and activities of the Receiver and accounts of the Receiver and its counsel

1 described therein, including the Receiver's updated interim statement of receipts  
2 and disbursements.

3  
4 The Receiver requests direction and an order respecting the documents and files  
5 electronically stored in a number of computer servers located at the Inkster  
6 Property. An order respecting documents is required if the Court is prepared to  
7 grant the approval and vesting order being sought respecting the Inkster property.  
8 An order respecting documents affects not only the parties in this proceeding, but  
9 third parties who claim that certain documents must be preserved as they may be  
10 relevant to proceedings that may proceed in the United States of America.

11  
12 The Receiver submits that it has the power to enter into the Sale Agreement  
13 pursuant to its powers under paragraphs 5(b) and 6(m) of the receivership order.

14  
15 The receivership order authorizes the Receiver to market and pursue offers for the  
16 sale of the debtor's property. Court approval is required for any sale transaction in  
17 which the purchase price exceeds \$250,000. The sale of the Inkster Property  
18 requires Court approval. The Sale Agreement is subject to Court approval, and the  
19 parties contemplate that the Transaction will close within 60 days following Court  
20 approval.

21  
22 The respondents, and in particularly NPL, challenge the Receiver's authority to  
23 complete the Sale Agreement and sell the Inkster property on numerous grounds.  
24 The respondents challenge the Receivers eighth report, supplementary eight report,  
25 ninth report, and the supplementary ninth report, and submit that the Court should  
26 not approve the activities of the Receiver and the fees claimed, including the  
27 Receiver's fees and legal counsel fees.

28  
29 The respondents seek relief in connection with the fees sought to be approved by  
30 the Receiver and its counsel, and those issues and the passing of accounts have  
31 been adjourned to be heard on January 11, 2021, at 10 AM.

32  
33 The respondents submit that the statement of receipts and disbursements filed by  
34 the Receiver and included in the ninth report establishes that the Lenders have  
35 been paid in full and therefore the Receiver should be discharged. The numerous  
36 affidavits filed in these proceedings describe the respondents as the Nygard Group  
37 or the Nygard Group of Companies. One of the respondents, NPL, is the sole  
38 owner of real property, previously used by the Nygard Group of Companies,  
39 including the Inkster Property.

40  
41 The Court has granted approval and vesting orders relating to two other properties

1 owned by NPL, namely, the Niagara property located in Toronto, and the Notre  
2 Dame property located in Winnipeg. The respondents submit that the net sale  
3 proceeds paid to the Lenders in connection with the sale of those two properties  
4 totals \$19.6 million.

5  
6 The respondents submit:

- 7 (a) the Lenders hold a security interest in the Property of the respondent,  
8 and once the Lenders have been paid in full, the Lenders have no  
9 interest in the Property and therefore are not authorized to proceed  
10 with the sale of the Inkster Property;
- 11 (b) NPL, as a limited recourse guarantor pursuant to the Credit  
12 Agreement, steps into the shoes of the Lenders to the extent of its  
13 payment to the Lenders and is entitled to an assignment of the  
14 security interest held by the Lenders;
- 15 (c) the Receiver is not authorized to market and sell the Inkster  
16 Property, and its continuous possession of the Inkster Property is  
17 wrongful and amounts to a trespass, as the Inkster Property is owned  
18 by NPL, a separate and distinct corporate entity. This entity (NPL) is  
19 no longer indebted to the Lenders;
- 20 (d) Nygard International Partnership (“NIP”), the entity that carried on  
21 the fashion clothing business in Canada, intends to make a proposal  
22 in bankruptcy and therefore seeks to lift the stay of proceedings  
23 previously granted by this Court, and permit a new licenced  
24 insolvency trustee, Albert Gelman Inc. (“AGI”), to act as the  
25 proposal trustee in accordance with the *BIA*;
- 26 (e) the Receiver finalized the Sale Agreement, notwithstanding the  
27 motion filed by the respondents challenging the sale of the Inkster  
28 Property was made prior to entering into the amended agreement to  
29 finalize the sale. The Receiver proceeded to do so, negotiating a  
30 substantial reduction in the purchase price, contrary to the  
31 receivership order, which requires the Receiver to submit offers to  
32 the Court for approval prior to acceptance;
- 33 (f) the Approval and Vesting Order sought in connection with the  
34 Inkster Property is not available to convey the fee simple interest  
35 held by NPL in order to satisfy the debts and liabilities of the  
36 separate entity, NIP; and
- 37 (g) seeking Court approval respecting sale of the Inkster Property  
38 requires an order for the “substantive consolidation” of the assets  
39 and liabilities of the respondents. The Receiver has not made a  
40 motion for such an order. Such a remedy is extraordinary, and the  
41 legal test set out in the authorities when applied to the facts and

1 circumstances of this case has not been satisfied by the Receiver.  
2 (See *Redstone Investment Corp (Re)*, 2016 ONSC 4453 [2016] O.J.  
3 No. 5205)  
4

5 The respondents submit that the best solution to address the preservation of  
6 documents located at the Inkster Property is for the Court to not approve the Sale  
7 Agreement and leave the documents and servers intact at that location while a  
8 proposal in bankruptcy is prepared by AIG as the new proposal trustee. In the  
9 alternative, the respondent seeks access to the servers to be able to review the data  
10 and determine what data needs to be preserved and decrease the costs of  
11 preserving the relevant data. The respondents submit that half of the data includes  
12 patterns and photographs of clothing that are not relevant for any purposes. A  
13 further 25 percent of the documents include invoices and payment records which  
14 are not relevant.  
15

16 Finally, the respondent submits that they should be permitted a reasonable period  
17 of time to determine if the Receiver's plan to preserve documents can be  
18 implemented at a reasonable cost and whether a competitive quote would better  
19 serve the stakeholders, including the unsecured creditors.  
20

21 Following the hearing on November 13, 2020, counsel for the Receiver advised  
22 that the Purchaser had agreed to an amendment to the Sale Agreement, providing  
23 for an extension of time for Court approval of the Transaction until on or before  
24 November 20, 2020. The parties all agree that this matter is urgent and as a result I  
25 convened court today to deliver my reasons for decision orally.  
26

### 27 Analysis, Findings and Directions

28

29 After reviewing all of the evidence and the briefs filed, the following are my  
30 findings and directions:

- 31 a) The Receiver is Court-appointed, and the duties and role of a Court-  
32 appointed Receiver must be distinguished from a privately appointed  
33 Receiver. A Court-appointed Receiver is charged with the duty to  
34 account for all receipts and disbursements and must continue to act  
35 in that capacity until discharged by the Court. A Court-appointed  
36 Receiver acts as a Court officer for the benefit of all stakeholders.  
37 The Receiver is a fiduciary for any surplus funds received which  
38 may be payable to other creditors and the debtors. (See *Ostrander v.*  
39 *Niagara Helicopters Ltd. et al.* (1974), 1 O.R. (2d) 281, 40 D.L.R.  
40 (3d) 161 (Ont. H.C.); Frank Bennett *On Receiverships*, 3<sup>rd</sup> Ed 2011,  
41 at p 608; *Canadian Commercial Bank v. Simmons Drilling Ltd.*,

1 [1989] 78 Sask.R. 87, 62 D.L.R. (4th) 243 (Sask. C.A.); and *BIA* at  
2 s. 247);

- 3 b) I am satisfied the Receiver has successfully managed the liquidation  
4 process to substantially pay the debt owing to the Lenders. I disagree  
5 with the submission advanced by the respondents that the Receiver  
6 has become a trespasser and continuing to liquidate real property is  
7 wrongful and inappropriate;
- 8 c) NPL is a limited recourse guarantor pursuant to the Credit  
9 Agreement. NIP, the entity that carried on the fashion clothing  
10 business is also a guarantor pursuant to the Credit Agreement. Both  
11 entities may have rights to subrogation to the extent of their  
12 payments to the Lenders were made on behalf of the borrowers, as  
13 defined in the Credit Agreement;
- 14 d) Pursuant to the receivership order, the Receiver is authorized to  
15 market and sell the Inkster Property to satisfy the Lenders' debt, the  
16 Receiver's borrowing charge, the landlord's charge and other  
17 creditors claims including the claims that may be advanced by the  
18 debtors such as NPL and NIP. The Receiver is fulfilling its duties as  
19 a Court-appointed officer. The Receiver is neither a trespasser nor is  
20 its conduct wrongful or illegal in the circumstances;
- 21 e) There are still a number of matters that must be completed by the  
22 Receiver as the Court's officer in the administration of the  
23 receivership proceedings. Paragraph 64 of the Receiver's ninth report  
24 lists the various steps that must be completed. I do not intend to read  
25 those numerous steps that are required onto the record. They are  
26 contained in paragraph 64 of the ninth report;
- 27 f) The Receiver and AGI disagree on the proper accounting treatment  
28 of certain assets and liabilities and treatment of intercompany loans  
29 within the Nygard Group of Companies. I agree with the analysis  
30 provided by the Receiver that it is incorrect to characterize the  
31 proceeds generated from the NPL property sales as repayment of  
32 NIP's debt to the Lenders and result in NIP owing approximately  
33 \$17 million to NPL;
- 34 g) The Receiver and AGI agree that a review of the accounting records  
35 of the Nygard Group of Companies show that as at March 18th,  
36 2020, NPL was indebted to NIP in the amount of approximately \$2.5  
37 million, and NEL was indebted to NIP in the amount of  
38 approximately \$18.1 million. I agree with the Receiver that the  
39 correct accounting treatment respecting the proceeds generated from  
40 the NPL property sales, namely the Niagara property and the Notre  
41 Dame property, is an intercompany payable as between one or more

1 of the US debtors and NPL, and not an intercompany payable  
2 between NIP and NPL. This interpretation is consistent with the  
3 terms of the Credit Agreement which makes it clear that NIP and  
4 NPL are guarantors, not borrowers;

5 h) The Receiver is a fiduciary respecting the assets and proceeds of sale  
6 of the Property, including the sale proceeds of the Inkster Property  
7 and must continue to report to the Court. There are competing claims  
8 which will have to be determined if the parties are unable to agree on  
9 the priority disputes;

10 i) The parties agree on the factors to be considered by the Court in  
11 assessing whether to approve the sale of assets by a Court-appointed  
12 Receiver. In *Shape Foods Inc. (Re)*, 2009 MBQB 171, 241 Man.R.  
13 (2d) 235 (QL), Menzies J. cited with approval *Crown Trust v.*  
14 *Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.);  
15 and Bennett, *On Receiverships* (2nd Ed.) (1999); Carswell at p. 251,  
16 the four criteria for the Court to consider as follows:

- 17 1) The court should consider whether the receiver has made a  
18 sufficient effort to get the best price and has not acted  
19 improvidently.
- 20 2) The court should consider the interests of the parties.
- 21 3) The court should consider the efficacy and integrity of the  
22 process by which offers are obtained.
- 23 4) The court should consider whether there has been unfairness in  
24 the working out of the process.
- 25
- 26

27 j) Menzies J. referred to two additional principles at para. 21 of his  
28 decision as follows:

29  
30 **21** In *Royal Bank v. Soundair*, (1991) 7 C.B.R. (3d) 1, 4 O.R. (3d)  
31 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont C. A.), the Ontario Court  
32 of Appeal outlined two principles for a court to consider in  
33 reviewing a sale of property. The first principle is that a court should  
34 place a great deal of confidence in the actions taken and the opinions  
35 formed by the receiver-manager. Unless the contrary is clearly  
36 shown, the court should assume that the receiver-manager is acting  
37 properly. The second principle is a court should be reluctant to  
38 second-guess, with the benefit of hindsight, the considered business  
39 decisions of the receiver-manager.

40  
41 k) The ninth report, and the supplementary ninth report of the Receiver  
42 address the Inkster Property and the steps taken to market the Inkster

1 Property, the sale agreement, including all amendments negotiated  
2 respecting the sale of the Inkster property as well as the Receiver's  
3 recommendation. The marketing process utilized by the Receiver is  
4 described in paragraph 69 of the ninth report, and the key aspects of  
5 the marketing process undertaken by the real estate broker are  
6 summarized by the Receiver. I will not read into the record all the  
7 subparagraphs. Numerous steps are described that were taken by  
8 Colliers International with respect to marketing the Inkster Property.  
9

10 The Receiver describes the building permit and building code issues in the ninth  
11 report and provides information establishing that the Inkster Property, as currently  
12 configured, does not have a current occupancy permit because certain building  
13 permits were not resolved with the City of Winnipeg (the "City").  
14

15 In addition to the building permit issues, the Inkster Property contains an elaborate  
16 multi-level and customized racking system (the "fast track system") which was  
17 important for the debtor's operations and is not required by the Purchaser. The  
18 estimated cost for removal of the fast track system is approximately \$200,000.  
19

20 The ninth report also provides detailed information regarding the fire rating  
21 resistance ("FRR") issue related to the second level of the Inkster Property. The  
22 City takes the position that the entire building needs to comply with the current  
23 Manitoba Building Code, and the current FRR is insufficient to meet the current  
24 code requirement. In order to meet the conditions imposed by the Purchaser in the  
25 Sale Agreement, the Purchaser and the Receiver executed amendments to the sale  
26 agreement as described in the ninth report. The Receiver outlines various options  
27 to address the FRR issue at paragraph 81 of the ninth report. Suffice to say that the  
28 cost associated with upgrading the second level of the Inkster Property,  
29 demolishing the second level, and deconstructing the canopy to the building would  
30 require substantial remediation work.  
31

32 On or about August 28, 2020, the Purchaser of the Inkster Property advised that  
33 notwithstanding the FRR issue and other issues it was still interested in proceeding  
34 to purchaser the Inkster Property, but not at the original purchase price. After good  
35 faith negotiations, the parties agreed to a purchase price reduction of eight percent  
36 to permit the Purchaser to address the costs associated with the City's building  
37 code issues and the financing conditions contained in the Sale Agreement. The  
38 Receiver has expressed a view in the ninth report that the purchase price reduction  
39 is reasonable in the circumstances as it takes into account the costs that would be  
40 incurred by the Receiver to remove the fast track system and deconstruct the  
41 enclosed canopy, amounts that would likely need to be incurred by the Receiver in

1 order to sell the Inkster Property to another potential purchaser.  
2

3 Further, the Receiver states that the purchase price reduction provides partial  
4 compensation to the Purchaser for the cost and risk that could be incurred to  
5 resolve the FRR issue post closing of the Transaction. All deposits have been paid  
6 and the Transaction contemplated by the Sale Agreement is ready to close subject  
7 to Court approval.  
8

9 The Receiver also reported that a second offer to purchase was received for the  
10 Inkster Property. The ninth report and the confidential appendix to the ninth report  
11 provide information relating to the second offer. The second offer contained a 60-  
12 day conditional period from the date of acceptance to permit the offeror to  
13 complete its due diligence investigations. The second offer did not conform to the  
14 form of offer to purchase included in the data room prepared by the Receiver. The  
15 Receiver instructed the broker to contact the agent of the second offeror to provide  
16 feedback and disclose that there was a pending building code issue, and to inquire  
17 whether the second offeror was prepared to remove the finance conditions and  
18 reduce its due diligence period to determine whether a superior offer could be  
19 achieved in a timely fashion. The Receiver reported that the broker did not receive  
20 a response from the agent of the second offeror in a timely manner, and the  
21 Receiver concluded the second offer was not feasible.  
22

23 The Receiver provided a response to the various issues raised in the affidavit of  
24 Mr. Fenske affirmed October 20, 2020. The Receiver also considered feedback  
25 received from prospective purchasers and concerns and observations expressed by  
26 the broker respecting the Inkster Property and the various limitations, including the  
27 configuration of the Inkster property, the ceiling height, the fast track system, and  
28 the FRR issue.  
29

30 At paragraph 99 of the ninth report, the Receiver outlines the key elements of the  
31 Transaction. I will not read those into the record. The Receiver expresses the  
32 opinion that the Transaction represents the best recovery for the Inkster Property in  
33 the circumstances and recommends the Court grant an order approving the  
34 Transaction and Sale Agreement for the following reasons:  
35

- 36 (a) The marketing process undertaken by the Receiver, with the  
37 assistance of Colliers, and the activities undertaken by the  
38 Receiver leading to the Inkster Transaction was designed to  
39 solicit interest from a number of *bona fide* parties that would  
40 be interested in and familiar with industrial real property  
41 assets

- 1 (b) there is a limited market for the Inkster Property. The Inkster  
2 Property has been on the market since late April 2020 and the  
3 market has been extensively canvassed in the process leading  
4 up to the Inkster Transaction and all likely bidders, including  
5 Mr. Nygard and the Gardena Landlords, have already been  
6 provided with an opportunity to bid on the Inkster Property;
- 7 (c) the further marketing of the Purchased Assets would, in the  
8 Receiver's view, not likely result in greater realizations and  
9 may put the Inkster Transaction at risk, impairing recoveries;
- 10 (d) the Purchaser assumes the cost and risk of the FRR Issue and  
11 in removal of the Fast Track System, which costs could be  
12 significant;
- 13 (e) the Inkster Transaction represents the only binding offer  
14 received for the Purchased Assets; and
- 15 (f) the Purchaser is able to close in 60 days of issuance of the  
16 Inkster Approval and Vesting Order, the proceeds of which  
17 could potentially result in meaningful recoveries for the  
18 unsecured creditors of the Debtors' estates.  
19

20 Having considered the evidence filed, including the ninth report, supplementary  
21 ninth report, and the confidential appendices, as well as the affidavit evidence filed  
22 on behalf of the respondents, including the reports filed by AGI, I find as follows:  
23

- 24 1. The Receiver has made sufficient effort to get the best price for the  
25 Inkster Property and has not acted improvidently.
- 26 2. The best interests of the parties are satisfied by completing the  
27 transaction as soon as is reasonably possible.
- 28 3. The marketing process utilized by the Receiver and the real estate  
29 broker was commercially fair and reasonable and carried out with  
30 efficacy and integrity.
- 31 4. The Lenders, the primary secured creditor, the debtors, landlords who  
32 hold valid landlords charge, and other creditors support the Transaction.
- 33 5. There has been no unfairness in the marketing process, concluding with  
34 the Sale Agreement.  
35

36 After considering all of the applicable criteria, I conclude that the Transaction  
37 should be approved as requested by the Receiver. In accordance with the principles  
38 set out above, I place a great deal of confidence in the actions taken and the  
39 opinions formed by the Receiver. The approval and vesting order attached as  
40 schedule 8 of the notice of motion is granted.  
41

1 In considering whether to approve the sale of the Inkster property, I reviewed and  
2 considered the reports filed by AGI and the NOI alternative respecting some of the  
3 Nygard Group of Companies. Because I found that the treatment of the previous  
4 NPL property sales by Nygard Group accounting staff and AGI was not  
5 appropriate, I conclude that the underlying premise for the NOI alternative is flawed  
6 and inappropriate. The accounting analysis is inconsistent with the terms of the  
7 Credit Agreement and inconsistent with the original NOI filing in which all  
8 Canadian debtors, including NPL, reported they were insolvent and included one  
9 consolidated creditor list with the Canadian debtors, totalling approximately \$60.5  
10 million.

11  
12 The proposed proposal trustee at the time was A. Farber and Partners Inc. I  
13 originally stayed the NOI proceedings because I found that the Nygard Group of  
14 Companies were not acting in good faith and with due diligence, as required for  
15 debtors to remain in possession and to seek the protection of the *BIA* under the  
16 proposal process. The NOI alternative and the scenarios suggested by AGI are  
17 based on inappropriate accounting treatment, and the NOI alternative is therefore  
18 not viable.

19  
20 There is insufficient evidence to establish that NEL and NPL are solvent entities,  
21 and I do not accept the opinion of AGI that they are solvent. I remain of the view  
22 that the Receiver is in the best position to liquidate assets, assess the priority of the  
23 various claims, and make a recommendation to the Court to address claims of  
24 other stakeholders. Now is not the time to discharge the Receiver and appoint a  
25 proposal trustee. The respondent's request a lift of the stay and permit some of the  
26 Canadian debtors to make a proposal in bankruptcy is denied.

27  
28 In the briefs filed by the parties, submissions were made regarding the Court's  
29 discretion to make an order assigning the debtor into bankruptcy on a consolidated  
30 basis for what is referred to in some of the authorities as a "substantive  
31 consolidation" of the estates of the respondents. In my view, Court approval  
32 respecting the sale of the Inkster Property does not require an order for the  
33 substantive consolidation of the assets and liabilities of the respondents. The  
34 evidence satisfies me that it is in the best interests of all stakeholders to grant the  
35 approval and vesting order and to permit the Receiver to complete its duties, as  
36 detailed in the ninth report. The respondents correctly point out that the Receiver  
37 has not made a motion for the substantive consolidation of the estates of the  
38 respondents. I agree that such a remedy is extraordinary, and it is a factor I  
39 considered in determining whether to grant the approval and vesting order in this  
40 case. If the Receiver elects to pursue such an order, I would expect the Receiver to  
41 file a motion and introduce further evidence. I have not made such a finding at this

1 time.

2  
3 To conclude, Receiver's request to abridge the time for service and dispense with  
4 further service is granted. The approval and vesting order respecting the Inkster  
5 Property is granted. The Receiver's request for a sealing order respecting the  
6 confidential appendices to the ninth report is granted. A temporary sealing order is  
7 customary in receivership proceedings. In my view, the sealing order is necessary  
8 as there is a real and substantial risk of harm to the interest of the stakeholders in  
9 this proceeding in the event such information is disclosed prior to the completion  
10 of the Transaction. The sealing order shall remain in effect until the Transaction is  
11 concluded or further order of the Court.

12  
13 The Receiver's eight report, the supplementary eighth report, the ninth report and  
14 supplementary ninth report are approved. The interim statement of receipts and  
15 disbursements contained in the ninth report is approved. The professional fees and  
16 disbursements of the Receiver, TDS, and Katan are contested by the respondents,  
17 and the passing of those accounts is adjourned to January 11, 2021, at 10 AM.

18  
19 All parties agree that steps must be taken to preserve the relevant documents that  
20 are located at the Inkster Property prior to the closing of the Transaction. The  
21 solution suggested by the Receiver appears to be reasonable, although the cost is  
22 high. I agree with the submission made by the respondents that much of the data  
23 that may be stored on the computer servers may be irrelevant and not required in  
24 the future. I am prepared to grant the respondents a reasonable period of time to  
25 determine whether the Receiver's plan to preserve documents may be implemented  
26 at a more reasonable cost.

27  
28 I expect the parties to cooperate regarding the review and preservation of  
29 documents and, as I have said in the past, I would have expected the parties to  
30 agree on the manner in which documents will be preserved in order to meet the  
31 legal requirements of all stakeholders. If the respondents are able to obtain a  
32 competitive quote for the preservation of documents from a third-party supplier,  
33 they can provide that quote to the Receiver for review. If the parties are unable to  
34 agree within the next 21 days, counsel may schedule a further date before me by  
35 contacting the trial coordinator.

36  
37 That concludes my oral reasons for decision.

38  
39  
40 EXCERPT CONCLUDED

---

IN THE MATTER OF WHITE OAK COMMERCIAL FINANCE, LLC v.  
NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES,  
INC., NYGARD NY RETAIL, LLC., 4093879 CANADA LTD., 4093887 CANADA  
LTD., NYGARD PROPERTIES LTD., AND NYGARD ENTERPRISES LTD.

---

I, KRYSTLE PALYNCHUK, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Twelve (T12), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.

*Krystle Palynchuk*

\_\_\_\_\_  
COURT TRANSCRIBER

## **APPENDIX G**

IN THE COURT OF QUEEN'S BENCH FOR MANITOBA  
JUDICIAL CENTRE OF WINNIPEG

BETWEEN

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant

and

NYGARD HOLDINGS (USA) LIMITED,  
NYGARD INC., FASHION VENTURES, INC.,  
NYGARD NY RETAIL, LLC, 4093879 CANADA LTD.,  
4093887 CANADA LTD., NYGARD INTERNATIONAL PARTNERSHIP,  
NYGARD PROPERTIES LTD.,  
AND NYGARD ENTERPRISES LTD.,

Respondents

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REASONS FOR JUDGMENT  
(Pages T1 - T24)

---

June 30, 2020  
Winnipeg, Manitoba

Royal Reporting, A Veritext Company  
120 - 330 St. Mary Avenue  
Winnipeg, Manitoba  
R3C 3Z5  
Phone: 204-306-9149  
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1 Proceedings taken in the Court of Queen's Bench, Winnipeg, Manitoba

2

3

4 June 30, 2020

Afternoon Session

5

6 The Honourable Mr. Justice

The Court of Queen's Bench

7 J. Edmond

for Manitoba

8

9 C. Howden

For the Applicant

10 J. Dacks

For the Applicant

11 W. Onchulenko

For the Respondents

12 B. Taylor

For the Receiver

13 M. LaBossiere

For the Receiver

14 P. Patel

For the Receiver

15 A. Sherman

For the Receiver

16 K. Pohorily

Court Clerk

17

18

19 **Reasons for Judgment**

20

21 THE COURT:

Let me just start by saying I will deliver

22 my reasons for decision orally today. I did receive the further filings that were

23 filed over the course of the last few days, including today, this morning. I have

24 seen the Supplementary Third Report, a further motions brief from the Receiver. I

25 have also seen the affidavit from Mr. Nygard and then the briefs filed on behalf of

26 the respondents and Mr. Nygard in connection with the motion that was heard last

27 week. Have I missed anything?

28

29 MR. TAYLOR:

I don't believe so, My Lord.

30

31 THE COURT:

All right. So if a copy of the transcript of

32 the reasons for decision is ordered, I will reserve the right to make some edits to

33 the oral decision for grammatical or clarification purposes but not in relation to

34 any substantive matter or issue.

35

36 Just by way of introduction, the terms that I will use in these reasons for decision

37 are the defined terms in the receivership order, granted March 18, 2020.

38

39 Richter Advisory Group Inc., the Receiver, is a court appointed Receiver pursuant

40 to the receivership order. The Receiver seeks an order under the *Bankruptcy and*

41 *Insolvency Act* as amended (*BIA*), in a form attached as schedule 'A' to the notice

1 of motion, which has been defined as the Notre Dame Approval and Vesting  
2 Order. The Receiver seeks an order approving the sale transaction contemplated by  
3 the accepted offer to purchase, dated May 22, 2020, between the Receiver as  
4 vendor and Mist Holdings Inc. (or such nominee as designated by Mist Holdings  
5 Inc. as purchaser, which I will define as the purchaser). The sale agreement was  
6 entered into between the Receiver and the purchaser pursuant to the Receiver's  
7 powers under paragraphs 5(b) and 6(m) of the receivership order. The Receiver  
8 seeks a vesting order, vesting in the purchaser all the right, title and interest of the  
9 debtor Nygard Properties Ltd. (NPL) in and to the assets described in the sale  
10 agreement, the land and premises located at 1300, 1302 and 1340 Notre Dame  
11 Avenue, and 1440 Clifton Street in Winnipeg, Manitoba (Notre Dame property),  
12 free and clear of any claims or encumbrances, except permitted encumbrances, all  
13 as set out in the draft approval and vesting order. The Receiver also seeks a sealing  
14 order respecting the confidential appendixes to the Third Report of the Receiver  
15 and an order approving the Third Report and Supplementary Third Report of the  
16 Receiver.

17

18 The respondents and an interested party, Mr. Peter Nygard, contest the motion  
19 made by the Receiver on a number of grounds. The respondents maintain the  
20 Receiver and the real estate agent did not properly market the property to obtain  
21 the highest price and best sale terms. In essence, the respondents submit that the  
22 sale price respecting the Notre Dame property is a significant discount to a listing  
23 price of \$5,245,000 and the Receiver should be required to wait until the market  
24 conditions improve prior to finalizing the sale of the Notre Dame property.  
25 Further, they submit that the Receiver should pursue a second offer that was made  
26 respecting the Notre Dame property which is "higher in value than what was  
27 offered by Mist." Further, the respondents and Mr. Peter Nygard submit that Mr.  
28 Nygard leased a portion of 1340 Notre Dame Avenue and his intention is to  
29 continue his residence at 1340 Notre Dame Avenue pursuant to an alleged  
30 residential tenancy agreement with NPL. Finally, Mr. Nygard submits that *The*  
31 *Residential Tenancies Act* C.C.S.M. c. R119 prohibits evictions due to COVID-19  
32 until at least September 30, 2020 and the steps taken by the Receiver to provide  
33 notice of termination of the residential tenancy is void by reason of regulations  
34 passed pursuant to *The Residential Tenancies Act*. I propose to deal with each of  
35 these issues separately.

36

### 37 Notre Dame Approval and Vesting Order

38

39 The receivership order authorizes the Receiver to market and pursue offers for the  
40 sale of the debtor's property. Court approval is required for any sale transaction in  
41 which the purchase price exceeds \$250,000. The sale of the Notre Dame property

1 requires court approval.

2

3 The parties agree on the factors to be considered by the court when assessing a  
4 proposed sale of assets by a court appointed Receiver. In *Shape Foods Inc. (Re)*  
5 2009 MBQB 171, 241 Man.R. (2d) 235, Menzies J. cited with approval *Crown*  
6 *Trust v. Rosenberg* (1986) 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.) and  
7 Bennett on Receiverships 2nd Edition (1999) Carswell, at p. 251, the four criteria  
8 for the court to consider as follows:

9

10 1) The court should consider whether the receiver has  
11 made a sufficient effort to get the best price and has not  
12 acted improvidently.

13

14 2) The court should consider the interests of the parties.

15

16 3) The court should consider the efficacy and integrity of  
17 the process by which offers are obtained.

18

19 4) The court should consider whether there has been  
20 unfairness in the working out of the process.

21

22 Menzies J. referred to two additional principles at paragraph 21 as follows: (as  
23 read)

24

25 In *Royal Bank v. Soundair* (1991) 7 C.B.R. (3d) 1, 4 O.R.  
26 (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), the  
27 Ontario Court of Appeal outlined two principles for a  
28 court to consider in reviewing a sale of property. The first  
29 principle is the court should place a great deal of  
30 confidence in the actions taken and the opinions formed  
31 by the receiver-manager. Unless the contrary is clearly  
32 shown, the court should assume that the receiver-manager  
33 is acting properly. The second principle is a court should  
34 be reluctant to second-guess, with the benefit of hindsight,  
35 the considered business decisions of the Receiver-  
36 manager. I will now consider the relevant criteria in this  
37 transaction.

38

39 In assessing whether the Receiver has made a sufficient effort to get the best price  
40 and has not acted improvidently, I must consider the steps taken by the Receiver  
41 and its agent, Colliers International. Details of the marketing process are set out in

1 the Receiver's Third Report. Commencing at paragraph 46, the Third Report  
2 states: (as read)

3  
4 As noted in the Supplementary First Report, on April 21,  
5 2020, the Receiver, White Oak and Colliers entered into a  
6 listing agreement in respect of the Winnipeg Properties,  
7 including the Notre Dame Property. The Notre Dame  
8 Property was listed on MLS on April 29, 2020 at a listing  
9 price of \$5,245,000 and with an open offer date. The key  
10 aspects of the marketing process undertaken by Colliers  
11 with respect to the Notre Dame Property, and its results,  
12 are summarized as follows:

13  
14 (a) on or about April 27, 2020, Colliers  
15 disseminated an email communication to its  
16 database of approximately 200 industrial clients  
17 from Manitoba and beyond to advise of the Notre  
18 Dame Property transaction opportunity. Further, on  
19 or about April 29, 2020, the Colliers' listing team  
20 sent direct emails to an additional list of 150  
21 targeted prospective purchasers, which list  
22 included users, developers, investors from  
23 Manitoba and beyond;

24  
25 (b) four of the parties contacted by Colliers,  
26 including Mist, signed confidentiality agreements,  
27 and accessed the electronic data room prepared by  
28 Colliers to provide interested parties with  
29 additional information on the Notre Dame  
30 Property. The Receiver understands copies of the  
31 PCA (referred to in the 3<sup>rd</sup> report as a "Property  
32 Condition Assessment"), ESA (referred to in the  
33 3<sup>rd</sup> report as an "Environmental Site Assessment")  
34 and the form of offer to purchase (the "OTP") were  
35 included in the data room;

36  
37 (c) Colliers, with the assistance of the Receiver,  
38 facilitated due diligence efforts by, among other  
39 things, coordinating site visits to view and inspect  
40 the Notre Dame Property. In total, three parties  
41 attended at the Notre Dame Property for a site tour;

1 and

2  
3 (d) on May 16, 2020, Mist submitted a conditional  
4 offer to purchase the Notre Dame Property, which  
5 offer was at a significant discount to the listing  
6 price of \$5,245,000. After consultation with the  
7 Lenders, the Receiver engaged in negotiations with  
8 Mist and the parties executed the Notre Dame  
9 Purchase Agreement on May 22, 2020, which  
10 agreement included a conditional period of ten (10)  
11 business days from the acceptance of the offer to  
12 allow Mist to complete and be satisfied with the  
13 physical and environmental inspection (the  
14 "Inspection Condition") of the Notre Dame  
15 Property.

16  
17 Further, the Receiver stated at paragraph 47 of the Third Report as follows: (as  
18 read)

19  
20 Based on the feedback received from prospective  
21 purchasers and its own assessment of the property,  
22 Colliers noted the following concerns/observations with  
23 respect to the Notre Dame Property:

24  
25 (a) Although an offer had been received from Mist,  
26 any other prospective users or investors interested  
27 in the property would likely require a Phase II  
28 ESA, as recommended in the ESA from HLC. As  
29 noted, a Phase II ESA could take between 6 to 8  
30 weeks to complete and the potential liability could  
31 be minimal or involve a significant expense for  
32 environmental remediation, which would be  
33 factored into the offer price from any other  
34 potential purchaser;

35  
36 (b) 1340 will need a new roof and HVAC system  
37 in the near term, which could cost upwards of  
38 \$800,000. This cost was not taken into account in  
39 the listing price, will be factored into the offer  
40 price from any prospective purchaser;

41

1 (c) 1340 was a total footprint of approximately  
2 69,000 square feet, but only provides 59,000 of  
3 usable square footage as there is approximately  
4 10,000 sqft of unleaseable space that is included in  
5 the building (indoor loading area, apartments  
6 below grade, interior demising walls that break the  
7 space up). This 10,000 sqft area will not generate  
8 revenue for a landlord from a tenant and is,  
9 therefore, lowering the value of the asset;

10  
11 (d) the two smaller buildings are older, and may  
12 not be code compliant and, therefore, could be  
13 difficult to lease out as currently constructed;

14  
15 (e) the apartment residences constructed within  
16 1340 would likely not be of interest to prospective  
17 purchasers and would need to be demolished; and

18  
19 (f) the Notre Dame Property was listed at its  
20 "highest and best use", which would be a single  
21 tenant industrial user. Unfortunately, the users  
22 contacted by Colliers were not interested in the  
23 Notre Dame Property due, in part, to the age of the  
24 buildings. The majority of interest received was  
25 from redevelopment and/or demolition buyers,  
26 such as Mist, which buyers would require a lower  
27 price to justify redevelopment costs.

28  
29 As to the status of the Notre Dame purchase agreement, the Receiver confirmed  
30 that the purchaser delivered the first deposit in waive conditions. At the hearing,  
31 counsel for the Receiver confirmed that all conditions set out in the Notre Dame  
32 purchase agreement had been waived such that it was an unconditional agreement.  
33 In considering whether the first criteria has been met, it is necessary to assess a  
34 second offer that was received by the Receiver on June 9, 2020. This is addressed  
35 at paragraphs 49-51 of the Third Report as follows: (as read)

36  
37 Also on June 9, 2020, an agent representing another  
38 prospective purchaser (the "Second Offeror") submitted a  
39 conditional offer (the "Second Offer") for the Notre Dame  
40 Property. While the Second Offer was higher in value than  
41 what was offered by Mist pursuant to the Notre Dame

1 Purchase Agreement, the Second Offer was highly  
2 conditional and contained a 45-day conditional period  
3 from acceptance for the Second Offeror to complete its  
4 due diligence investigations with respect to the Notre  
5 Dame Property including, but not limited to: title searches,  
6 site dimensions, building and site inspections and  
7 investigations, zoning, conditional use approvals,  
8 subdivision approvals, signage approvals, geotechnical  
9 and environmental soils investigations, availability and  
10 capacity of services, securing financing, finalization of  
11 development plans and final approval of the board of  
12 directors of the Second Offeror. Further, the Receiver  
13 understands through discussions with Colliers that the  
14 Second Offeror's plan for the Notre Dame Property was to  
15 launch a new business venture that would require new  
16 business partners and financing.

17  
18 As the second offer was submitted with limited due  
19 diligence, was highly conditional and did not conform to  
20 the OTP included in the data room, the Receiver was  
21 concerned the Second Offer had a significant risk and may  
22 jeopardize the Notre Dame Purchase Agreement, which  
23 was now binding on Mist as applicable conditions had  
24 been satisfied. In the circumstances, the Receiver  
25 instructed Colliers to contact the agent for the Second  
26 Offeror to inquire whether the Second Offeror would be  
27 prepared to submit an unconditional offer in order to  
28 determine whether a superior offer could be achieved in a  
29 timely manner without risking the Notre Dame Purchase  
30 Agreement.

31  
32 On June 10, 2020, the agent for the Second Offeror  
33 advised Colliers that its client would not proceed with a  
34 subsequent unconditional offer for the Notre Dame  
35 Property and the Second Offer, with conditions, stands as  
36 the only offer the Second Offeror would be prepared to  
37 proceed with. As such, the Receiver, in consultation with  
38 TDS and Colliers, determined that the Second Offer was  
39 not feasible and that further meaningful discussions with  
40 the Second Offeror were not justifiable.  
41

1 The Receiver expresses the opinion that the Notre Dame transaction represents the  
2 best recovery for the purchased assets in the circumstances and recommends that  
3 the court approve the Notre Dame purchase agreement for the following reasons as  
4 set out in paragraph 62 of the Third Report: (as read)  
5

6 (a) the marketing process undertaken by the Receiver,  
7 with the assistance of Colliers, and the activities  
8 undertaken by the Receiver leading to the Notre Dame  
9 Transaction was designed to solicit interest from a number  
10 of *bona fide* parties that would be interested in and  
11 familiar with industrial real property assets;  
12

13 (b) there is a limited market for the Notre Dame Property.  
14 The market has been extensively canvassed in the process  
15 leading up to the Notre Dame Transaction and all likely  
16 bidders have already been provided with an opportunity to  
17 bid on the Notre Dame Property;  
18

19 (c) the further marketing of the Purchased Assets would,  
20 in the Receiver's view, not likely result in greater  
21 realizations and may put the Notre Dame Transaction at  
22 risk impairing recoveries;  
23

24 (d) the COVID-19 pandemic has created significant  
25 economic uncertainty, which is likely to continue for an  
26 extended period of time, and which has adversely affected  
27 commercial real property prices and transactions as users,  
28 investors and developers continue to assess and focus on  
29 their own operations and develop contingency plans to  
30 preserve capital;  
31

32 (e) the Purchaser assumes the risk of the Phase II ESA and  
33 any potential liability that comes from the assessment,  
34 which liability could be significant;  
35

36 (f) the Notre Dame Transaction represents the only  
37 binding offer received for the Purchased Assets;  
38

39 (g) the Lenders support the Notre Dame Transaction; and  
40

41 (h) the Purchaser is able to close in 30 days of issuance of

1           the Approval and Vesting Order, the proceeds of which  
2           would result in a meaningful repayment of the Lenders'  
3           outstanding advances under the Credit Facility.  
4

5       After considering all of the evidence as well as the submissions advanced on  
6       behalf of the respondents and Mr. Nygard, I am satisfied that the Receiver and  
7       Colliers have made sufficient effort to get the best price and the steps taken  
8       establish that they have not acted improvidently in recommending the Notre Dame  
9       purchase agreement. I am satisfied that delaying the approval of the Notre Dame  
10      transaction would be unfair and contrary to the efficacy and integrity of the  
11      process. I accept the Receiver's opinion that the COVID-19 pandemic has created  
12      significant economic uncertainty, which is likely to continue for an extended  
13      period of time, and further marketing of the Notre Dame property would not likely  
14      result in greater realizations. As well, the ongoing costs of delaying the sale of the  
15      property necessitates moving forward with the liquidation process within a  
16      reasonable time frame.  
17

18     For the reasons given by the Receiver, I accept that the Notre Dame transaction  
19     represents the best recovery and I am loath to reject the recommendation of the  
20     Receiver. Specifically, I accept the Receiver's opinion and recommendation that  
21     the second offer is not feasible and further discussions with the second offeror  
22     were not justified.  
23

24     In accordance with the principles set out above, I place a great deal of confidence  
25     in the opinions expressed by the Receiver and accept that I should assume that the  
26     Receiver is acting properly unless a contrary intention is clearly shown. The Court  
27     is not in a position to second-guess the opinion expressed by the Receiver  
28     regarding the feasibility of the second offer.  
29

30     One of the factors or criteria that I should consider is the interests of the party. In  
31     my view, the interests of all the parties favour approving the Notre Dame purchase  
32     agreement.  
33

34     One interest that I must take into account is the interest of Mr. Nygard who claims  
35     he is a tenant of 1340 Notre Dame Avenue, Winnipeg, Manitoba. Mr. Nygard  
36     initially relied upon an affidavit affirmed by Mr. Greg Fenske, a former director of  
37     systems of Nygard group of companies. That affidavit was affirmed based almost  
38     entirely upon being advised of information from Mr. Nygard. The only paragraph  
39     in Mr. Fenske's affidavit within his personal knowledge is a statement in paragraph  
40     5 in which he states: (as read)  
41

1 I have personally seen Peter Nygard in this residence on  
2 numerous occasions over the course of the past year.  
3

4 Counsel for the respondents and Mr. Nygard advised that there was not sufficient  
5 time to have an affidavit affirmed by Mr. Nygard as he was residing at his lake  
6 property. As a result, the hearing was adjourned last week and Mr. Nygard's  
7 counsel was given an opportunity to file an affidavit affirmed by Mr. Nygard  
8 based on his personal knowledge. That affidavit was filed and confirms that Mr.  
9 Nygard is a permanent resident of the Bahamas and that he has, from time to time,  
10 resided at 1340 Notre Dame Avenue in Winnipeg. Subsequent to the receivership  
11 order on March 18, 2020, Mr. Nygard advised the Receiver that 1340 Notre Dame  
12 was his residence and asked to have the Receiver confirm this tenancy. According  
13 to Mr. Nygard, he made an offer to the Receiver on March 27, 2020, to buy or  
14 lease a portion of the buildings contained within the property included in the Notre  
15 Dame purchase agreement.  
16

17 The Receiver's Third Report addresses the issue of Mr. Nygard occupying certain  
18 apartments constructed within a portion of 1340 Notre Dame Avenue as follows:  
19 (as read)  
20

21 The Receiver notes that on March 27, 2020, Levene  
22 Tadman Golub Law Corporation ("LTGLC"), as counsel  
23 for Mr. Nygard, contacted TDS to inquire about the  
24 Receiver's plans for 1340. At the time, Mr. Nygard  
25 occupied certain apartments constructed within a portion  
26 of 1340 and LTGLC noted that Mr. Nygard was interested  
27 in a transaction to either purchase the premises in which  
28 he resided or the whole building, including the equipment  
29 and leasehold improvements in 1340, but not the  
30 inventory in 1340. LTGLC noted that Mr. Nygard did not  
31 communicate a firm offer in respect of 1340, but indicated  
32 a value well below the value described in the CBRE  
33 Appraisal (as hereinafter defined, as well as the value that  
34 had been put before the Manitoba Court in the Affidavit of  
35 Greg Fenske dated March 11, 2020) and consistent with  
36 the price described in the Notre Dame Purchase  
37 Agreement. At the time, the Receiver had yet to retain a  
38 commercial property broker to market and sell the  
39 Winnipeg Properties and, as such, TDS advised LTGLC  
40 that the Receiver would consider the proposal and respond  
41 in due course.

1  
2 In due course, TDS communicated to LTGLC that the  
3 Receiver intended to list the Winnipeg Properties  
4 (including the Notre Dame Property) for sale and would  
5 follow up with details of the listing agent contact once the  
6 listing agreement had been put in place.  
7

8 Subsequent to the retention of Colliers to market the  
9 Winnipeg Properties, TDS contacted LTGLC to provide  
10 the contact details for the lead broker for the Notre Dame  
11 Property. As at the date of this Third Report, the Receiver  
12 understands that neither LTGLC nor Mr. Nygard (or  
13 anyone on his behalf) had contacted Colliers to express  
14 interest in the Notre Dame property, and LTGLC  
15 confirmed that Mr. Nygard was not interested in acquiring  
16 the Notre Dame Property.  
17

18 It is the Receiver's understanding that Mr. Nygard had the  
19 use of the "residence" at the Notre Dame Property as an  
20 accommodation from NPL; that there were no formal  
21 tenancy arrangements in place and no rent or other costs  
22 were paid by or attributed to Mr. Nygard, and that all  
23 utilities and other costs of the residence premises were  
24 paid by NPL or NIP. It is further the understanding of the  
25 Receiver that Mr. Nygard no longer occupies the  
26 residence which forms part of the Notre Dame Property  
27 and resides elsewhere. Pursuant to arrangements made  
28 with the Receiver, Mr. Nygard has had his personal items  
29 removed from the said residence. The Receiver has  
30 received an additional request from LTGLC on behalf of  
31 Mr. Nygard to remove other property that Mr. Nygard  
32 asserts is his personal property, located in other areas of  
33 the Notre Dame Property. The Receiver is considering that  
34 request, and whether certain of the assets described therein  
35 are or may be "Property" subject to the Receivership  
36 Order and expects to address these matters with LTGLC  
37 in due course.  
38

39 On May 24, 2020, in an e-mail to TDS, LTGLC made the  
40 following statement:  
41

1           While my client does not accept the principle that  
2           his personal residence at Notre Dame is part of the  
3           Receivership property, he would like access to  
4           remove his personal items this weekend. Can this  
5           be arranged?  
6

7           No basis for this assertion was or has been or has been  
8           provided, and it appears that the entirety of the Notre  
9           Dame Property and its premises are "Property" as defined  
10          in the Receivership Order, as amended by the General  
11          Order, and are therefore part of the "Receivership  
12          property".  
13

14         As to the offer by Mr. Nygard to buy or rent a portion of the 1340 Notre Dame  
15         property, the Receiver states at paras. 38-39 of the supplementary Third Report as  
16         follows: (as read)  
17

18           In the June 25 Nygard affidavit, Mr. Nygard proposes that  
19           a solution to the above issue would be for the Receiver to  
20           sell or rent the Residences and Boardroom spaces to him  
21           and presumably sell or lease the remainder of the Notre  
22           Dame Property to Mist. Even if the Purchaser were  
23           interested in such a transaction, Mr. Nygard's proposal  
24           would require a severance of title for 1340 as the  
25           warehouse and Residence/Boardroom portions share a  
26           common wall, which may not be legally feasible in the  
27           circumstances. As noted above, 1340 is currently zoned  
28           M3, which does not permit residential uses.  
29

30           If such a severance and residential use were permitted, the  
31           Receiver would be left to sell an industrial use property  
32           that contained, below grade, a residential property owned  
33           by Mr. Nygard, which circumstance would be expected to  
34           be very significant -- would be expected to very  
35           significantly diminish the value of the remainder of 1340.  
36

37         On the basis of my review of the evidence I am not satisfied that NPL or NIP and  
38         Mr. Nygard entered into a residential tenancy agreement, or that *The Residential*  
39         *Tenancies Act* applies to the facts of this case. 1340 Notre Dame is a commercial  
40         property and is not zoned to permit residential tenancies. The evidence establishes  
41         that Mr. Nygard was accommodated by NPL as a prior employee or consultant of

1 the Nygard group of companies because his permanent residence was in the  
2 Bahamas. He resided at 1340 Notre Dame from time to time in order to perform  
3 his duties as an employee, officer and director or consultant for one or more of the  
4 Nygard group of companies. Those duties are no longer required. Although Mr.  
5 Nygard stated in his affidavit that he has been continuously residing at 1340 Notre  
6 Dame, he is presently residing at his lake property and was unable to provide an  
7 affidavit when this matter was heard last week.

8  
9 There is no evidence of a written tenancy agreement, a lease term, rent paid,  
10 renewal terms, utilities, repairs, security or damage deposit paid or any other terms  
11 and conditions that are ordinarily agreed to by parties entering into residential  
12 tenancy agreements. NPL and Mr. Nygard are sophisticated parties who would be  
13 expected to follow the law and document agreements. While it is possible to enter  
14 into a verbal tenancy agreement, other documents such as e-mails, expense reports,  
15 or other documents prepared in the ordinary course of business ought to have been  
16 produced to evidence the formation of the residential tenancy agreement, and the  
17 payment of rent or security deposits. Mr. Nygard produced no such documents or  
18 information other than references to the fact that he resided at 1340 Notre Dame,  
19 which was where the Nygard group of companies carried on business prior to the  
20 receivership order. The evidence establishes that to the extent there was an  
21 agreement, it was an accommodation to Mr. Nygard while he was performing  
22 duties for and on behalf of the Nygard Group of Companies to use the space on a  
23 temporary basis only, not a residential tenancy agreement.

24  
25 If Mr. Nygard was a tenant at 1340 Notre Dame, I would have expected that his  
26 counsel would have advanced that position at the time the application to appoint a  
27 Receiver was heard in court in March 2020. Further, the evidence establishes that  
28 Mr. Nygard had notice that the Receiver would be selling the property and I do not  
29 accept the proposition by Mr. Nygard that 1340 Notre Dame is not subject to the  
30 receivership order or that he has a valid claim as a tenant of NPL. 1340 Notre  
31 Dame is property as defined in the receivership order and the sale approval order  
32 that have been granted and at no time has Mr. Nygard advanced the position in  
33 court that he was a tenant at 1340 Notre Dame until the day before the hearing on  
34 June 25, 2020. His counsel forwarded the affidavit of Mr. Fenske and a brief at  
35 9:52 PM to my e-mail address on June 24th, 2020.

36  
37 Having reviewed all of the evidence I am satisfied that the Notre Dame purchase  
38 agreement and the Notre Dame transaction satisfy the conditions for approval as  
39 set out in the *Shape Foods Inc.* decision. The process taken by the Receiver and  
40 Colliers was commercially fair and reasonable and sufficient to get the best price  
41 for the Notre Dame property. I am also satisfied that the process was carried out

1 with efficacy and integrity. While the second offer was higher in value than what  
2 was offered pursuant to the Notre Dame purchase agreement, the second offer  
3 contained many conditions as well as a 45-day conditional period from acceptance  
4 of the second offer to complete significant due diligence. The second offer was  
5 subject to financing and finalizing development plans. The Receiver concluded  
6 through its discussions with its agent Colliers that the second offeror's plan for the  
7 Notre Dame property was to launch a new business venture that would require new  
8 business partners and financing. Waiting for that to materialize was not feasible  
9 and justifiable. Mr. Nygard's proposal to buy or lease a portion of 1340 Notre  
10 Dame is not reasonable or practical in the circumstances.

11

12 The lenders, as the primary secured creditors and the debtors, support the Notre  
13 Dame transaction. Sorry. The primary secured creditors of the debtors support the  
14 Notre Dame transaction. The landlords who hold the landlords' charge are not  
15 opposed to the Notre Dame transaction. No other parties interested in this  
16 proceeding are opposing the Notre Dame transaction.

17

18 After considering all of the criteria, including Mr. Nygard's claim, I have  
19 concluded the proposed Notre Dame transaction should be approved as requested  
20 by the Receiver. In accordance with the principles set out above, I place a great  
21 deal of confidence in the actions taken and opinions formed by the Receiver. The  
22 evidence falls far short of establishing that the Receiver has acted improvidently.  
23 Quite the contrary. The evidence establishes that sufficient effort was made to  
24 secure the best offer and accordingly the Notre Dame transaction is approved. The  
25 vesting order as requested by the Receiver is granted.

26

27 The sealing order respecting the CBRE appraisal, the offer summary and the  
28 unredacted Notre Dame purchase agreement are confidential documents that  
29 should be sealed as is customary in receivership proceedings. The sealing order  
30 will remain in effect until the commercial transaction is concluded.

31

32 The other orders sought are granted including

- 33 (a) approving the Receiver's Third Report and supplementary Third Report;  
34 (b) approving the June 14 interim receipts and disbursements; and  
35 (c) approving the professional fees and disbursements of the Receiver, TDS, and  
36 Katten in the amounts set out in the Third Report.

37

38 That concludes my reasons for decision.

39

40 All right. The --

41

- 1 MR. TAYLOR: Thank you.  
2
- 3 THE COURT: -- second --  
4
- 5 MR. TAYLOR: My Lord, it's Taylor.  
6
- 7 THE COURT: Yes.  
8
- 9 MR. TAYLOR: If I could just in terms of the form of  
10 Notre Dame approval and vesting order that is attached to the motion, I note one  
11 change, My Lord, from this form in -- in your -- in your decision. The sealing  
12 provision in this form of order provides that it'll be sealed and remain stored until  
13 further order of this Court. You've just commented that it would be until  
14 culmination or completion of the transactions or the transactions are concluded.  
15 Are you looking, My Lord, for us to amend that paragraph of the sealing order or  
16 is the order form fine and can we proceed with it?  
17
- 18 THE COURT: Well, it is customary that these sealing  
19 orders are granted in receivership applications but usually they are granted for the  
20 minimum amount of time required for that to occur. And the reason I use the  
21 wording that I did is because it seems to me that the reason it is confidential is that  
22 if something happens with this transaction, it does not go through, and a further  
23 transaction is going to have to be negotiated by the parties, that knowledge of this  
24 would be detrimental to that process. So it does seem to me, and we can leave it  
25 until further order of the court, but would be expected, as far as I am concerned,  
26 for another order then to be taken out that would release the sealing of those  
27 documents once the transaction is then completed.  
28
- 29 MR. TAYLOR: My Lord, that's -- that's -- that would be  
30 fine, satisfactory that -- that it -- that the challenge with wording that's until  
31 completion of the transactions, *et cetera*, is that, as you point out, we don't quite  
32 know when that might happen if something happens to this transaction. So -- so  
33 we -- we are going to leave this to read until -- "upon further order of this court,"  
34 and then we will -- we will provide or seek an order along probably with other  
35 relief we might be seeking in the future that allows for this to be unsealed once the  
36 transaction is completed.  
37
- 38 THE COURT: All right. That is fine. You can do that.  
39 And we can bring this matter is going to be back on in court on August the 10th in  
40 any event and I can receive an update at that time as to where the transaction is at.  
41

1 MR. TAYLOR: Yes. My Lord, are you -- I just asked the  
2 other day that we waive a consent as to form given that the nature of your order.  
3 I'm not certain whether -- I -- I expect that my learned friends on behalf of the  
4 lenders are fine with that. I don't know whether my learned friend Mr. Onchulenko  
5 is fine with that.

6

7 MR. ONCHULENKO: My Lord, if -- if you've reviewed the  
8 order and that is the order that you're making today, other than it's -- I guess I  
9 would like to see what the changes, if any, to the order.

10

11 MR. TAYLOR: Well, the only change would be -- the  
12 only change would be to the appearances section.

13

14 MR. ONCHULENKO: My Lord, then if you've reviewed the  
15 order and that's the order, there would be nothing for me to review that I can see.

16

17 THE COURT: All right. That is fine then. You can  
18 waive the consent as to form. I have granted essentially the order that you attached  
19 to the notice of motion, so that is fine.

20

21 MR. TAYLOR: Thank you, My Lord.

22

23 (SUBMISSIONS BY COUNSEL)

24

25 THE COURT: All right. Good afternoon. I am back and  
26 I am prepared to give my decision orally on the Dillard's approval motion that is  
27 been sought. As is usually the case, if a copy of the transcript of my reasons for  
28 decision is ordered by any of the parties, I reserve the right to make some edits to  
29 the oral decision for grammatical or clerical purposes but not in relation to any  
30 substantive matter or issue.

31

32 Just by way of introduction, the terms that I will use in these reasons for decision  
33 are the defined terms in the receivership order granted March 18, 2020. The  
34 Receiver seeks an order under the *Bankruptcy and Insolvency Act* in the form  
35 attached as Schedule 'A' to the notice of motion seeking approval of a settlement  
36 made between the Receiver on behalf of the debtors and Dillard's Inc., who I will  
37 define as Dillard's, and also reference to the agreement will be the Dillard's  
38 settlement approval order, which is what is being sought.

39

40 The Receiver has filed the Fourth Report, dated June 27, 2020 (Fourth Report).  
41 The Fourth Report provides information concerning the settlement agreement and

1 the release claims (the Settlement Agreement) entered into between the Receiver  
2 and Dillard's. The Settlement Agreement resolves a complex series of claims and  
3 disputes between the parties and addresses the implementation of certain  
4 transactions (the Transactions). I agree that the Fourth Report provides an  
5 evidentiary basis for the Dillard's settlement approval order. The Transactions  
6 contemplated by the Settlement Agreement involve the following:

7  
8 (a) the sale of certain inventory (as defined in the Settlement Agreement) by the  
9 Receiver to Dillard's;

10  
11 (b) the sale of a trademark (as defined in the Settlement Agreement) by the  
12 Receiver to Dillard's (together with the inventory, the "subject assets");

13  
14 (c) the payment of certain amounts by Dillard's to the Receiver in respect of the  
15 accounts receivable alleged to be owing by Dillard's;

16  
17 (d) the establishment of a certain escrow fund with respect to certain litigation; and

18  
19 (e) the full and final settlement, mutual release, and conclusion of all claims back  
20 and forth as between Dillard's and the Receiver (on behalf of the debtors) which  
21 arise out of, or are in any way connected with any transactions, events,  
22 occurrences, acts or omissions alleged to have occurred as a result of the past  
23 business relationship or dealings between Dillard's and any one or more of the  
24 debtors, including any agents or employees thereof.

25  
26 The Settlement Agreement and the transactions require court approval pursuant to  
27 the receivership order. Time is of the essence as Dillard's will purchase the  
28 inventory only if it is available for pickup not later than July 3, 2020. As a result,  
29 the significant benefits to the debtors' stakeholders from the totality of the terms of  
30 the settlement agreement will be lost if approval is not granted.

31  
32 The settlement agreement was negotiated and concluded with the assistance of the  
33 Consultant, as referred to in the sale approval order, pursuant to the consulting  
34 agreement as defined in that order.

35  
36 The factors to be considered by the court when assessing a proposed sale of assets  
37 by a court appointed Receiver were outlined in my oral reasons for decision  
38 delivered earlier today. (See *Shape Foods Inc.*) It bears repeating that the four  
39 criteria for the Court to consider are:

- 40  
41 1) The court should consider whether the Receiver has

1 made a sufficient effort to get the best price and has not  
2 acted improvidently.

3  
4 2) The court should consider the interests of the parties.

5  
6 3) The court should consider the efficacy and integrity of  
7 the process by which offers are obtained.

8  
9 4) The court should consider whether there has been  
10 unfairness in the working out of the process.

11  
12 The two additional principles referenced by Menzies, J. in *Shape Foods Inc.* earlier  
13 today apply equally to this motion.

14  
15 There is no dispute as set forth in the Fourth Report, Dillard's was a significant  
16 customer of the respondents, acquiring both the Nygard Groups' branded and  
17 private label garments. The Fourth Report states that Dillard's represented 67  
18 percent of the Nygard groups' total third party wholesale sales. The relationship  
19 produced significant receivables owing by Dillard's to the Nygard Group.  
20 Paragraph 27 of the Fourth Report states that as at March 31, 2020, NIP's books  
21 and records reflected the following assets related to Dillard's:

- 22 - Accounts Receivable \$6,866,889 and,  
23 - Inventory on Hand (ordered for Dillard's) \$8,469,515.

24  
25 Paragraph 28 of the Fourth Report states that the value of the inventory on hand in  
26 NIP's books is greater than the actual "cost" value of that inventory. Once the  
27 receivership order was granted the Receiver commenced settlement discussions  
28 with Dillard's with a view towards settling all claims and counterclaims advanced  
29 by Dillard's.

30  
31 The respondents and Edson's Investments Inc. (Edson's) and Brause Investments  
32 Inc. (Brause) filed a motion brief addressing the Receiver's Fourth Report and the  
33 proposed Dillard's settlement approval order.

34  
35 These parties requested approval of the Fourth Report be refused or alternatively  
36 this motion be adjourned to permit the Receiver to provide further information  
37 on:

38  
39 (a) the services provided by the Consultant;

40  
41 (b) the remuneration paid or expected to be paid to the Consultant for said

1 services;

2  
3 (c) the basis for including the Consultant in negotiations leading to the Dillard's  
4 agreement after previously excluding Dillard's from the Consultant agreement;  
5 and

6  
7 (d) the reasons for the Consultant failing to disclose (and/or the Receiver failing to  
8 report) its intention to syndicate the consulting agreement to accompany related to  
9 one of the lenders; and

10  
11 (e) further particulars on the services being provided by SB360 generally and with  
12 respect to the Dillard's agreement specifically.

13  
14 After reviewing the documentation filed, including the confidential appendices, I  
15 do not agree with the submission advanced on behalf of the respondents Edson's  
16 and Brause. I agree that time is of the essence and the Consultant's involvement is  
17 authorized pursuant to the sale approval order. The Receiver is in the best position  
18 to determine and assess the commercial reasonableness of the Dillard's settlement  
19 agreement. The Receiver has discretion to involve the Consultant in the manner it  
20 deems advisable in order to secure the best price to settle the various issues  
21 involving Dillard's, including the accounts receivable and inventory claims.

22  
23 The remuneration to be paid is always subject to court approval and the  
24 Consultant's fee is not being approved today. If there is some basis to challenge the  
25 fee, I do not accept that there is a sufficient basis to do so on the basis of the  
26 material that's been filed.

27  
28 In assessing the principles the court should consider in approving the Dillard's  
29 Settlement Agreement, the comments of Doherty J.A. in *Ravelston Corp. (Re)*,  
30 [2005] O.J. No. 5351 2005, CanLII 63802 (Ont. C.A.) are instructive: (as read)

31  
32 ... While the specific decision Richter had to make was an  
33 unusual one, it was not essentially different from many  
34 decisions that receivers must make. Receivers will often  
35 have to make difficult business choices that require a  
36 careful cost/benefit analysis and the weighing of  
37 competing, if not irreconcilable, interests. Those decisions  
38 will often involve choosing from among several possible  
39 courses of action, none of which may be clearly preferable  
40 to the others. Usually, there will be many factors to be  
41 identified and weighed by the receiver. Viable arguments

1 will be available in support of different options. The  
2 receiver must consider all of the available information, the  
3 interests of all legitimate stakeholders, and proceed in an  
4 evenhanded manner. That, of course, does not mean that  
5 all stakeholders must be equally satisfied with the course  
6 of conduct chosen by the receiver. If the receiver's  
7 decision is within the broad bounds of reasonableness, and  
8 if it proceeds fairly, having considered the interests of all  
9 stakeholders, the court will support the Receiver's  
10 decision. Richter's Tenth Report demonstrates that it fully  
11 analyzed the situation at hand before arriving at its  
12 decision as to RCL's best course of conduct.

13  
14 As set out in the Fourth Report and the Consultant's report attached as an  
15 appendix: (as read)

16  
17 (a) The Consultant expresses the view that the settlement  
18 relating to the accounts receivable owing by Dillard's is  
19 reasonable as it represents the full value of the Receiver's  
20 reconciliation of the amount owing by Dillard's subject  
21 only to adjustments relating to actual or potential exposure  
22 relating to trademark infringement cases;

23  
24 (b) the accounts receivable settlement involves a waiver  
25 by Dillard's of its right to claim any further reduction  
26 based on potential shortfalls below the guaranteed margin  
27 amount historically provided to Dillard's by the  
28 respondents and as set forth in the report;

29  
30 (c) potential purchasers have been contacted by the  
31 Consultant and have expressed reluctance to pursue any  
32 transaction because of the continued association of the  
33 inventory and trademark with the Nygard brand. Further,  
34 the investments labelled inventory is a brand owned by  
35 Dillard's and would require removal of the labels prior to  
36 sale;

37  
38 (d) the Settlement Agreement facilitates the sale by the  
39 Receiver of remaining in-stock inventory bearing the  
40 "Allison Daley" brand;

41

1 (e) as a result of the COVID-19 Pandemic, the supply  
2 chain has been flooded with inventory and buyers are  
3 steering towards higher-end brands currently available at  
4 significantly discounted pricing. Retailers have shown no  
5 interest in the Nygard inventory and trademark;

6  
7 (f) if the transactions under the Settlement Agreement fail  
8 to proceed, the Consultant expresses the view that it  
9 would continue to encounter resistance in its attempt to  
10 monetize the Nygard inventory and trademark and that the  
11 Consultant anticipates that the inventory recovery could  
12 significantly decline from the amount contemplated under  
13 the Settlement Agreement. Further, the realization could  
14 be reduced as a result of delays as retailers continue to  
15 discount seasonal merchandise and additional excess  
16 inventory enters the supply chain due to COVID-19;

17  
18 (g) as regards the trademark specifically, the Consultant  
19 expresses the view that the sale price under the Settlement  
20 Agreement is significantly greater than what could be  
21 realized from any other party based on its experience as  
22 outlined in the report.

23  
24 The Receiver received the assistance during the negotiation of the Settlement  
25 Agreement from the Consultant who has been described as having extensive  
26 experience providing advice and monetizing distressed assets in the fashion  
27 industry.

28  
29 I accept the opinion and recommendation made by the Receiver and the Consultant  
30 that the transactions contemplated by the Settlement Agreement were entered into  
31 as a result of sufficient effort to get the best price. The Receiver and the Consultant  
32 have not acted imprudently and have taken steps to secure the highest potential  
33 recovery for the assets. As well, any further delay in realizing upon the inventory  
34 and trademark could adversely impact the values and result in a lower recovery  
35 which would not be in the interests of all stakeholders.

36  
37 The Settlement Agreement represents a resolution of a complex series of issues  
38 between the debtors and Dillard's. Receivers often have to make difficult business  
39 choices that require careful cost/benefit analysis in the weighing of competing and  
40 in some cases irreconcilable differences or interests. The Receiver must consider  
41 all of the available information, the interests of legitimate stakeholders and

1 proceed in an even-handed manner. I am satisfied the Receiver has discharged its  
2 duty and has satisfied the court that the proposed Dillard's Settlement Agreement  
3 is commercially fair and reasonable in the circumstances.  
4

5 Edson's and Brause maintain that they have an interest in the inventory that is  
6 located at the Gardena, California properties. Those parties allege a lien claim  
7 against the inventory located at the Gardena properties. Insufficient briefs have  
8 been filed in connection with this issue in order to determine the validity and  
9 priority of the alleged lien claim. The Edson's and Brause claim for rent and any  
10 claim for a lien will be heard on August 10, 2020.  
11

12 Accordingly, the following orders are granted:  
13

14 (a) the time for service of the Dillard's settlement approval order motion and  
15 materials filed in support of the motion is abridged such that the motion is properly  
16 returnable today;  
17

18 (b) that the transactions contemplated by the Settlement Agreement are approved;  
19

20 (c) the confidential appendices attached to the Fourth Report of the Receiver are  
21 sealed until further order of the court; and  
22

23 (d) the Fourth Report is approved.  
24

25 This matter is adjourned until August 10, 2020 at 10:00 AM.  
26  
27  
28

29 \_\_\_\_\_  
30  
31 EXCERPT CONCLUDED  
\_\_\_\_\_

IN THE MATTER OF WHITE OAK COMMERCIAL FINANCE, LLC, v.  
NYGARD HOLDINGS (USA) LIMITED,  
NYGARD INC., FASHION VENTURES, INC.,  
NYGARD NY RETAIL, LLC., 4093879 CANADA LTD.,  
4093887 CANADA LTD., NYGARD PROPERTIES LTD.,  
AND NYGARD ENTERPRISES LTD.

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I, KRYSTLE PALYNCHUK, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Twenty-three (T23), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.

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COURT TRANSCRIBER