

**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.  
SUPPLEMENTARY TWELFTH REPORT OF THE RECEIVER**

**SEPTEMBER 14, 2021**

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SUPPLEMENTARY TWELFTH REPORT OF THE RECEIVER**

**SEPTEMBER 14, 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 “**March 9 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.

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. On October 21, 2020, the Manitoba Court made an Order (the “**Document Abandonment Order**”) approving, among other things, the abandonment of certain documents and property located in the California Properties and the Nygard Group retail stores.
14. On November 19, 2020, the Manitoba Court pronounced an Order (the “**Inkster Approval and Vesting Order**”) approving, among other things, the sale of certain NPL real property located at 1771 Inkster Blvd, Winnipeg Manitoba (the “**Inkster Property**”) and authorizing the Receiver to make such arrangements as it considered reasonable and appropriate for the preservation of over 5,000 boxes of physical documents (the “**Physical Records**”), and the data (the “**Electronic Records**”) and programs (the “**Programs**”) stored or accessible on the Nygard Group’s central information technology system (the “**IT System**”, and together with the Physical Records, Electronic Records and Programs, the “**Records**”).
15. On November 27, 2020, the Nygard Group appealed certain of the relief granted pursuant to the Inkster Approval and Vesting Order, including the authorization of the sale of the Inkster Property (the “**Inkster Appeal**”).

16. On December 8, 2020, the Manitoba Court provided additional direction (the “**December 8 Manitoba Court Direction**”) and clarification of the Order pronounced on November 19, 2020 in respect of the preservation of Records as well as the provision of certain Electronic Records to the Debtors and/or Mr. Nygard. The Receiver considers that the direction of the Manitoba Court as to those matters is properly described within the Inkster Approval and Vesting Order.
17. On December 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.
18. Subsequent to the pronouncement of the Lift Stay Order, on January 8, 2021, the Debtors discontinued the Inkster Appeal, which the Receiver agreed to accept on a without costs basis.
19. On January 28, 2021, the Manitoba Court pronounced an Order (the “**Broadway Approval and Vesting Order**”) approving, among other things, the sale of certain NPL real property located at 702 and 708 Broadway Avenue in Winnipeg, Manitoba (the “**Broadway Property**”).
20. On March 3, 2021, the Manitoba Court pronounced an Order (the “**Landlords’ Charge Claims Procedure Order**”) detailing the process (the “**Landlords’ Charge Claims Process**”) to quantify and resolve the claims of Landlords for any Unpaid Rent in respect of the lease for each retail store (collectively, the “**Leases**”) secured by the Landlords’ Charge.
21. 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>.
22. 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.
23. 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.
24. 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

25. The Receiver has previously filed twelve reports (and, collectively with seven 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.
26. The Receiver’s Twelfth Report, dated June 4, 2021 (the “**Twelfth Report**”) was filed with the Manitoba Court in support of a motion rescheduled to be returnable November 5, 2021 (the “**Net Receivership Proceeds Motion**”) for an Order, among other things, declaring that the assets and liabilities of the Debtors be treated as substantially consolidated for creditor purposes, and that the Receiver be authorized to file assignments in bankruptcy on behalf of the Debtors (including the US Debtors) on a substantially consolidated basis.
27. This report (the “**Supplementary Twelfth Report**”) is filed by the Receiver in response to the Debtor’s Notice of Motion, 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 Twelfth Report or, in the alternative, directing the Receiver to answer the questions (as well as any follow-up questions) attached as Schedule “A” to the Questions Motion.

## III. TERMS OF REFERENCE

28. In preparing this 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 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.
29. The Receiver has prepared this Supplementary Twelfth Report in its capacity as a Court-appointed officer to provide the Manitoba Court with information in respect of the Questions Motion. Parties using this 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.



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

#### IV. THE QUESTIONS MOTION

32. Following service of the Twelfth Report and various communications between TDS and counsel for the Debtors, Lavene Tadman Golub Law Corporation (“**LTGLC**”), in respect of certain matters addressed in the Twelfth Report, including the allocation of receivership costs/expenses, subrogation and other matters, on July 16, 2021, LTGLC sent TDS a list containing in excess of 103 numbered questions (comprising a total of 262 questions) for response by the Receiver (the “**262 Questions**”). A table separating out each individual/distinct question is attached hereto as **Appendix “A”**..
33. While the Receiver acknowledges that, at times, receivers will respond to reasonable stakeholder requests for additional information/clarification (and has done so previously in these Receivership Proceedings), there must be a demonstrably valid purpose for such clarification.
34. As noted in TDS’ July 30, 2021 email to LTGLC (the “**July 30 TDS Email**”), a copy of which is attached as Exhibit “E” to the Affidavit of Greg Fenske affirmed September 7, 2021 (the “**September 7 Fenske Affidavit**”) in support of the Questions Motion, in the Receiver’s view, (i) many of the 262 Questions have been addressed responsibly in the Twelfth Report, previously filed materials, or in communications between TDS and LTGLC, (ii) certain of the 262 Questions are argumentative, frivolous or irrelevant, (iii) certain of the 262 Questions can be answered by the Debtors or by LTGLC’s own review of the law, and (iv) it would be very time consuming and costly for the Receiver to respond to the 262 Questions.
35. In addition, and as also noted in the July 30 TDS Email, in the Receiver’s view, none of the 262 Questions are relevant or necessary for the Debtors to address the key issue in the Net Receivership Proceeds Motion that, based on the proper application of law respecting subrogation (the “**Subrogation Rights**”) under the *Mercantile Law Amendment Act*, NPL/NEL, and their ultimate owner, Mr. Peter Nygard, have no equity interest in the Net Receivership Proceeds.
36. In the Receiver’s view, the 262 Questions are prejudicial to the Receiver and other stakeholders, as responding to the 262 Questions will require the Receiver to expend a significant amount of time and considerable expense in attempting to respond to questions which appear to be irrelevant and unnecessary. The costs of such exercise would be borne, ultimately, by the Debtors’ unsecured creditors.

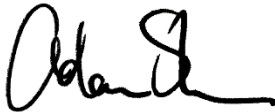
37. In this regard, the Receiver expects that NPL will endeavour to fund its professional costs of the Questions Motion and related matters from the Preserved Proceeds, the effect of which will be to diminish the Preserved Proceeds to the prejudice of creditors.
38. As it currently stands, on July 8, 2021, the Debtors, through LTGLC, requested additional retainer funds (\$350,000) for professional costs to be incurred by NPL in respect of the Receivership Proceedings. LTGLC also advised that Mr. Steve Mager had recently been appointed as a director of NPL (which carries on no active business and already has a director) and that he was to be compensated in the amount of \$6,500/month commencing July 2021 (the “**July 8 Proposed Payments**”).
39. As the Receiver is concerned that the July 8 Proposed Payments are not contemplated by the Proceeds Preservation Agreement and will dissipate the Preserved Proceeds to the prejudice of creditors, the Receiver filed a motion (the “**Second NPL Preservation of Sale Proceeds Motion**”) returnable November 5, 2021, seeking the Manitoba Court’s advice and direction with respect to whether the additional uses for the Preserved Proceeds, as requested by the Debtors, are proper and consistent with the terms of the NPL Proceeds Preservation Agreement.
40. In recognition of the time and considerable expense (to be borne by the Debtors’ creditors) in responding to the 262 Questions, TDS advised LTGLC that it would not be responding to the 262 Questions, but that the Receiver was available to discuss the matter further to determine those questions, if any, for which answers were genuinely and truly needed for the proper purpose of clarifying or amplifying the matters addressed in the Twelfth Report or responding to the key issue described in paragraph 35 herein. Unfortunately, rather than working cooperatively with the Receiver to determine those questions for which answers were genuinely and truly needed, the Debtors responded that answers to all the 262 Questions were necessary and thereafter on September 8, 2021 proceeded to file the Questions Motion. While the Receiver raised the prospect of the Debtors bringing such a motion on August 11, 2021 if the Debtors were not in agreement with the Receiver’s position, no such motion was filed until September 8, 2021, and the motion materials were not provided to the Service List maintained in the Receivership Proceedings until September 13, 2021.
41. As noted above, and as described extensively in the Twelfth Report and in certain communications between TDS and LTGLC, it is the Receiver’s view that, based on the proper application of Subrogation Rights, NPL/NEL, and their ultimate owner, Mr. Peter Nygard, have no equity interest in the Net Receivership Proceeds. Further, and as reflected in an email from TDS to LTGLC dated July 12, 2021 in response to a without prejudice settlement proposal presented to the Receiver (the “**July 12 TDS Email**”), the Receiver provided the Debtors with further

clarification and elaboration regarding certain key matters raised in the Twelfth Report. A redacted copy of the July 12 TDS Email (excluding the without prejudice settlement proposal) is attached hereto as **Appendix "B"**.

42. The Receiver estimates that it may require 150+ hours of the Receiver's time (excluding any follow up communications/questions) to properly respond to the 262 Questions, certain of which require the Receiver to review/reconcile/(re)allocate thousands of transactions among the Debtors both prior to and during the Receivership Proceedings.
43. In addition to the Receiver's time/cost, four (4) other professional service firms (the Receiver's counsel, two sets of counsel for the Debtors and the Debtors' financial advisor) will also expend considerable time and cost in either reviewing, considering or replying to the Receiver's response to the 262 Questions or in dealing with related matters, all ultimately at the expense the Debtors' unsecured creditors.
44. In the circumstances, the onerous, costly and, in the Receiver's view, unwarranted process of responding to the 262 Questions will be borne entirely by creditors of the Debtors. Accordingly, the Receiver considers it appropriate for the Manitoba Court to determine whether any of the 262 Questions should be answered by the Receiver and, to the extent that certain of the 262 Questions are to be answered, direction as to which party shall bear the professional costs related to answering the 262 Questions.

All of which is respectfully submitted on this 14th day of September, 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., any Nygard International Partnership**  
**and not in its personal capacity**



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Adam Sherman, MBA, CIRP, LIT



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Eric Finley, CPA, CA

## **APPENDIX A**

Actual Number	Number Assigned by Debtors	Question
1.	1(i)	under the heading "payroll", please explain how the \$8.1 million figure was calculated for NIP;
2.	1(ii)	why was \$980,000 in payroll allocated to the US entities?
3.	1(iii)	why was \$4.647 million in overhead allocated to corporate overheads?
4.	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?
5.	3	<p>Among the professional fees of \$6.438 million, there is an allocation based on gross proceeds of sale to each of NIP and NPL. Yet the amount of work associated with the sale of NPL's assets or dealing with NPL would be marginal: payment of hydro and realty taxes and the time spent by the Receiver hiring the brokers and deciding on realty offers and counteroffers in conjunction with the brokers.</p> <p>Please identify from the Receiver's dockets and those of its counsel which dockets are allocated to (a) NPL</p>
6.	3	<p>Among the professional fees of \$6.438 million, there is an allocation based on gross proceeds of sale to each of NIP and NPL. Yet the amount of work associated with the sale of NPL's assets or dealing with NPL would be marginal: payment of hydro and realty taxes and the time spent by the Receiver hiring the brokers and deciding on realty offers and counteroffers in conjunction with the brokers.</p> <p>Please identify from the Receiver's dockets and those of its counsel which dockets are allocated to ... (b) NIP</p>
7.	4	Of the substantial amount of data and computer hardware that is held by the Receiver, how much is the property or data of NPL?
8.	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?
9.	5	If not, explain the basis supporting \$4.155 million in corporate overhead allocation for NPL.

10.	6	The borrowings by the Receiver totaled \$30.082 million. How much, if any, of those borrowings were utilized for the benefit of NPL, rather than for the operating entities?
11.	7(i)	In light of the borrowings necessary for the operating business, how does or would the Receiver propose to book the payments to White Oak:  (i) In the books of the US entities
12.	7(ii)	In light of the borrowings necessary for the operating business, how does or would the Receiver propose to book the payments to White Oak:  (ii) In the books of NIP
13.	7(iii)	In light of the borrowings necessary for the operating business, how does or would the Receiver propose to book the payments to White Oak:  (iii) In the books of NPL
14.	8	What tax loss was created in NPL when NPL paid White Oak under its guarantee?
15.	8	Explain your answer and please document your assumptions.
16.	9	What impact would a consolidation order have on NPL's tax loss, referred to in the previous question?
17.	10	Provide a sub-schedule that lists separately the fees of the Receiver, TDS and Katten.
18.	11	Provide a sub-schedule that lists separately the fees of KLDDiscovery Inc., in relation to their preparation of the "forensic copy" and for any other consulting work that they have been paid for.
19.	11	Where are their [KLDDiscovery Inc.] fees reported/grouped in the Receipts and Disbursements statements?
20.	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.
21.	13(i)	With respect to the \$1,296,202 invoice related to the Falcon Lake Property and referenced at paragraph 156(e) of the 12 <sup>th</sup> Report and attached as Appendix I:

		(i) has the Receiver examined the lease between NPL and NIP to see whether the tenant was responsible to pay for the leasehold improvements?
22.	13(ii)	(i) ...if so, what is the answer?
23.	13(ii)	With respect to the \$1,296,202 invoice related to the Falcon Lake Property and referenced at paragraph 156(e) of the 12 <sup>th</sup> Report and attached as Appendix I:  (ii) is this invoice accounted for in the intercompany accounts between NIP and NPL?
24.	13(iii)	With respect to the \$1,296,202 invoice related to the Falcon Lake Property and referenced at paragraph 156(e) of the 12 <sup>th</sup> Report and attached as Appendix I:  (iii) does the Receiver agree that the contract started in 2016 (per the 1st revision reference)
25.		(iii) does the Receiver agree ... that as at Jan 27, 2018, \$1,097,339; 84% of the total, had already been invoiced by the contractor?
26.	13(iv)	With respect to the \$1,296,202 invoice related to the Falcon Lake Property and referenced at paragraph 156(e) of the 12 <sup>th</sup> Report and attached as Appendix I:  (iv) since Ernst & Young provided its audit opinion on the January 31, 2018 financial statements, would the Receiver agree that those financial statements can be relied upon for the purpose of being satisfied that at least \$1,097,339 of the total \$1,296,202 invoice would have been properly accounted for through the intercompany account between NIP and NPL?
27.	14	Provide a list of consultants who have been engaged and paid in relation to the ransomware attack ...
28.	14	...and set out how much was paid to each consultant.
29.	15	Were outside consultants or Richters' IT Group engaged to implement the Cloud Based Solution?
30.	15	If so, how much was paid
31.	15	Where are their fees reported/grouped in the Receipts and Disbursements statements.

32.	16	Provide a summary of any work performed by Richters' IT group.
33.	16	Are their fees set out in the Receiver's accounts?
34.	16	If not, provide the amount paid for fees
35.	16	... and show where their fees are reported/grouped in the Receipts and Disbursements statements.
36.	17	Has the source or original entry point of the ransomware attack been determined?
37.	17	If so, please provide details in relation to this.
38.	17	If not, has any attempt been made by Richter or outside consultants to determine the source or original entry point?
39.	18	Has the Receiver considered or established if any consultant may be liable for damages in relation to the ransomware attack
40.	18	has the Receiver considered commencing an action against such consultant(s)?
41.	19	Has the Ransomware attack affected the Receiver's ability to provide accurate and detailed Receipts and Disbursements statements?
42.	20	Does the Receiver have a listing of creditors, including names and amounts, by Debtor?
43.	20	If so, please provide that listing.
44.	21	Please provide copies of the notices sent by the Receiver pursuant to ss. 245 and 246 of the <i>Bankruptcy and Insolvency Act</i> , including a list of the addressees.
45.	22	Please confirm that the Receivership property does not include the Falcon Lake and Fieldstone properties
46.	23	With regard to para. 46 (b), with which (a) landlords ... did the Receiver assist?
47.	23	With regard to para. 46 (b), with which ... (b) suppliers did the Receiver assist?
48.	23	Which members of the Nygard Group was the Receiver assisting?
49.	24	With respect to para. 46 (d), which former employees did the Receiver retain?



50.	24	Produce the independent contractor agreements.
51.	25	With respect to para. 46 (h), which (a) payroll remittances and (b) for which Debtor companies did CRA conduct an audit?
52.	25	Produce the reports of CRA in that regard.
53.	26	With respect to para. 46 (i), in respect of which Debtors was the Department of Finance making a claim?
54.	26	Produce documentary evidence of such claims.
55.	27	With respect to para. 46 (j), what “conduct” was investigated
56.	27	...and what was the result of such investigation
57.	28	With respect to para. 46(s), which vehicles were “purportedly transferred”?
58.	28	What is meant by “purportedly”?
59.	29	With respect to para. 48, how did the attacker enter the password-protected servers?
60.	29	Please provide details of (i) damage;
61.	29	Please provide details of ... (ii) missing data;
62.	29	Please provide details of ... and (iii) explain what is meant by “functionality ... has been permanently compromised and will not operate in the same fashion”.
63.	29	Produce reports received from the Receiver’s consultant(s).
64.	30	With respect to para. 52, what “significant challenges [are] faced by the Receiver”?
65.	31	With respect to para. 53, were T4’s issued after the ransomware attack?
66.	31	If yes, produce.
67.	31	Were corporate tax returns filed?
68.	31	If yes, produce them.
69.	32	With respect to para. 69, how does the Receiver have an interest in the proceeds of the disposition of the Falcon Lake and Fieldstone properties “to maximize unsecured creditor recoveries”?
70.	32	Does the Receiver owe a fiduciary duty to NPL?
71.	32	... To NEL?

72.	32	...To Peter Nygard?
73.	33	With respect to para. 71, what are the “relevant issues”?
74.	34	With respect to para. 75 (a) (iii), what “creditor purposes”?
75.	34	Which creditors?
76.	35	Does the Receiver anticipate income tax recoveries on the basis of losses that have been sustained by some of the Debtors?
77.	35	If yes, which Debtors...
78.	35	If yes, ... and what income tax recoveries are anticipated?
79.	36	With respect to para. 86, which dispositions of property are expected to generate net proceeds of \$9.9 million?
80.	36	Please break down the proceeds by property.
81.	37	With respect to para. 87, which findings did the Court make which are relevant to the analysis?
82.	38	What makes the analysis on a separate corporation basis complex as stated in para. 89?
83.	38	Has the Receiver failed to maintain records that causes complications to the analysis?
84.	38	Has the Receiver made an analysis?
85.	38	Why not?
86.	38	Detail the analysis for .. subparagraphs (a)
87.	38	Detail the analysis for .. subparagraphs (b)
88.	38	Detail the analysis for .. subparagraphs (c)
89.	38	Detail the analysis for .. subparagraphs (d)
90.	38	Detail the analysis for .. subparagraphs (e)
91.	39(i)	With respect to para. 91 (a) – (d),  (i) how “meaningful” would the equity in NPL be in each outcome?
92.	39(ii)	With respect to para. 91 (a) – (d),  (ii) has the Receiver computed the subrogated claim which NIP has?

93.	39(ii)	With respect to para. 91 (a) – (d), (ii) ...Ditto re NPL?
94.	39(ii)	With respect to para. 91 (a) – (d), (ii) ...Please show the Receiver's calculation.
95.	39(iii)	With respect to para. 91 (a) – (d), (iii) how is it fair to NPL's creditors, including for example CRA, to consolidate NPL's assets with NIP's?
96.	39(iii)	With respect to para. 91 (a) – (d), (iii) ...On what basis is it reasonable to consolidate?
97.	39(iii)	With respect to para. 91 (a) – (d), (iii) ...Why is reasonableness relevant to the issue of consolidation
98.	39(iv)	With respect to para. 91 (a) – (d), (iv) why should Debtors assign into bankruptcy?
99.	39(iv)	With respect to para. 91 (a) – (d), (iv) ...If there is no consolidation, should NPL assign into bankruptcy?
100.	39(iv)	With respect to para. 91 (a) – (d), (iv) ...Why?
101.	40	With respect to para. 94 (a), please share the advice which the Receiver received from TDS, including support for such advice
102.	40(i)	with respect to 94 (a)(iii), please advise whether charging receivership expenses associated with liquidating the US Borrowers' inventory to NPL is fair and equitable, ...
103.	40(i)	... and whether doing so readjusts the priority an NPL creditor has to NPL assets (by using such NPL assets to pay non-NPL liabilities)?
104.	40(ii)	how did the Receiver calculate Corporate Overhead payroll of \$4.647 million?
105.	40(ii)	Please provide back-up schedule therefor.

106.	41	With respect to para. 94 (b), please elaborate on what “a more rigorous process of allocating expenses” consists of.
107.	42	With respect to para. 94 (d), explain why corporate payroll is not allocable to a particular Debtor.
108.	42	Did the Receiver neglect to keep track of payroll liability of each Debtor?
109.	42	Ditto re professional fees?
110.	42	On what basis is the Receiver’s allocation “reasonable”?
111.	43	With respect to para. 96, please explain why the posting of security by NPL to secure the Landlord’s Charge would render NPL liable for the Landlord’s Charge.
112.	44	With respect to para. 97, please elaborate on the Receiver’s allocation.
113.	44	Explain how the allocation to a particular Debtor “would not yield a different outcome”.
114.	45	For the purpose of argument of the pending motion, please undertake the “review” to be done on a “separate corporation basis”.
115.	46	With respect to para. 102, how does the existence of joint and several guarantors (NPI with an unlimited guarantee and NPL with a limited guarantee) lead to the allocation of a 50-50 split between the two guarantors?
116.	47	How does the Receiver book the receipt of the White Oak loan advance(s) in the books of (a) NI...
117.	47	How does the Receiver book the receipt of the White Oak loan advance(s) in the books of ... and (b) NIP?
118.	47	Also, how does the Receiver’s re-payment to White Oak reflected in (a) the books of NIP...
119.	47	Also, how does the Receiver’s re-payment to White Oak reflected in ... and (b) the books of NEL?
120.	47	Why has the Receiver not shown the Excess of Receipts over Disbursements of NIP in line 5 as being also a collection of the accounts receivable due to NI (Inc.) in line 1?
121.	48	With respect to Note 4 on p.37 (¶104), what is the aggregate of the claims of NIP unsecured creditors?

122.	48	What is the aggregate of the claims of NPL unsecured creditors?
123.	49	It is noted that in preparing all twelve of the Receiver's reports, the Receiver states that it relied on information it derived from the Debtors' financial records and statements. Has the Receiver found that any such information unreasonable or not internally consistent?
124.	49	If so, please state the information so found, and detail the unreasonableness or inconsistency.
125.	49	Does the Receiver dispute any of the contents of the most recent audited financial statements of Ernst & Young?
126.	49	Does it dispute inter-company balances therein?
127.	49	Please update such balances from the date of the last audited financials until the date of the receivership.
128.	50	With respect to paras. 109-110, the Receiver's accounting treatment differed from the Debtors because the Court held that the borrowers under the loan agreement were NI, not NIP. The Court relied on the express wording in the loan agreement, notwithstanding that the advances from White Oak went directly to NIP. Correct?
129.	51	With respect to para. 110, was the accounting treatment respecting the sales of Notre Dame and Niagara made by independent contractors of the Receiver under whose supervision they worked..
130.	51	... and by whom they were paid?
131.	51	Did the Receiver correct the accounting treatment?
132.	52	With respect to para. 112, does the Receiver accept the inter-company balances reflected there in support of its motion?
133.	52	If not, what does the Receiver say the inter-company balances really are?
134.	53	Are paras. 113-123 argument that the Receiver intended to advance in its brief rather than in its report.
135.	54	The Receiver has waived solicitor-client privilege in para. 119. Please produce the advice received from TDS.
136.	55	With respect to para. 120, does a limited guarantor and an unlimited guarantor owe equal obligations to contribute?

137.	56	With respect to para. 122, on what basis is the Receiver's equal allocation to NIP and NPL "fair" in light of NIP having received the benefit of the White Oak advances?
138.	57	With respect to para. 124, why were Fenske's compensation and the Debtors' professional fees allocated by the Receiver to NPL alone?
139.	58	With respect to para. 125, where has NPL argued that it has no third-party creditors?
140.	58	Was CRA a creditor at the date of Receivership...
141.	58	... or did it become a creditor as a result of the post-receivership liquidation?
142.	58	What does Receiver estimate that NPL's payment under its guarantee will generate for it as a tax loss?
143.	58	Is such loss reflected in the para. 128 chart?
144.	59	With respect to Note 1 on p. 45, please particularize what NPL expenses were paid by NIP and quantify them.
145.	60	With respect to para. 129, what other obligations "may" NPL have?
146.	60	Details of quantum.
147.	60	Basis for Receiver's "understanding" of NIP employees working for NIP?
148.	60	Was that reflected in the NIP-NPL inter-company transactions that were booked?
149.	61	With respect to the Consolidation Analysis on p. 46, on what basis is the Receiver entitled to seek a consolidation order for several US and Canadian corporations?
150.	62(a)	What return on the dollar would CRA receive as a creditor of NPL in (a) on a non-consolidated basis
151.	62(b)	... and (b) on a consolidated basis?
152.	63(a)	What return on the dollar would creditors of NI received in (a) on a non-consolidated basis;
153.	63(b)	... and (b) on a consolidated basis?
154.	64 (a)	What return on the dollar would creditors of NIP received in (a) on a non-consolidated basis;
155.	64(b)	... and (b) on a consolidated basis?

156.	65	What legal advice (oral and written) did the Receiver receive and which is referenced in para. 133?
157.	66	What legal advice (oral and written) did the Receiver receive and which is referenced in para. 133 (d)?
158.	67(a)	With respect to para. 147, which operations of (a) NPL; ... were financed by “a single credit facility”?
159.	67(b)	With respect to para. 147, which operations of ...; and (b) NEL, were financed by “a single credit facility”?
160.	68	With respect to para. 155, what is meant by “on an inconsistent basis”?
161.	68	Please particularize such transactions.
162.	68	What is meant by “non-commercial terms”?
163.	68	Please document those transactions.
164.	69	With respect to para. 156 (c), which specific terms are not “typical of commercial leases”?
165.	69	Were the NPL – leases to NIP at rental rates that were below what was, at the date of the leases, fair market value?
166.	70	With respect to para. 156 (d), did NIP benefit from certain activities and expenditures incurred by NPL?
167.	71	With respect to para. 156 (e), did the lease terms oblige NIP to pay for improvements to the Falcon Lake property?
168.	71	Did NIP’s staff benefit from such improvements?
169.	71	Were the improvements reflected in the inter-company accounting?
170.	72	With respect to para. 157, is the “nerve centre” for Royal Bank of Canada’s business, Royal Bank Plaza in Toronto?
171.	72	If not, where is it?
172.	73	With respect to para. 159, do some of the businesses operated by Royal Bank of Canada’s entities run using common letterhead, advertisements and marketing materials?
173.	74	With respect to Amazon (worldwide), does it commonly present as an integrated corporate enterprise that until recently was managed by Jeff Bezos?

174.	75	With respect to para. 162, were any expenses incurred or paid by NIP for the benefit of our related entities not captured by inter-company expense transactions?
175.	75	If yes, provide particulars of such transactions.
176.	76	With respect to para. 164, would such employees with a claim against NPL and NIP jointly and severally be prejudiced by a consolidation order (since these employees claims against NPL would be reduced significantly by having to share in NPL's assets with the creditors of NIP and NI)?
177.	77	With respect to para. 174, details of which individuals so advised the Receiver...
178.	77	... and what precisely each said.
179.	77	Produce supporting documentation.
180.	78	With respect to para. 175, which material transactions were not booked...
181.	78	... were inaccurate
182.	79	With respect to para. 176, why does the Receiver need to justify the benefits NIP received to make leasehold improvements several years ago?
183.	79	Does the Receiver know the value of the business generated by NIP's access to and use of the Falcon Lake property?
184.	80	With respect to para. 177, has the Receiver taken any steps to set aside or challenge the transactions referred to therein?
185.	80	Also, has the Receiver determined the benefit which NPL and its creditors and shareholder received, if any, from NPL's guarantee of the Credit Facility the proceeds of which went to NIP?
186.	81	With respect to para. 182, did this "view" of the Receiver preclude Ernst & Young from preparing audited financial statements?
187.	82	With respect to para. 186, what financial benefit did NPL receive from NIP?
188.	82	How is that calculated?
189.	82	Does the Receiver intend to claim against NPL on behalf of NIP?



190.	82	Same questions regarding NEL. With respect to para. 186, what financial benefit did NEL receive from NIP?
191.	82	How is this calculated?
192.	82	Does the Receiver intend to claim against NEL on behalf of NIP?
193.	83	With respect to paras. 186-187, does the Receiver know whether NPL could have leased out its properties to arm's length lessees at rates that are higher than NIP's contractual arrangements?
194.	84	With respect to para. 189, does the Receiver agree that NIP's return to creditors on a consolidated basis is 6.5¢ on the dollar compared to 6.4¢ on the dollar on an unconsolidated basis?
195.	84	Also, NPL's return to creditors on a consolidated basis is 6.5¢ on the dollar, compared to 100¢ on the dollar on a non-consolidated basis.
196.	85	With respect to para. 191, the Original NOI Proceedings contemplated an NOI for each entity, correct?
197.	85	There was no consolidation sought, correct?
198.	85	No motion was brought to consolidate, correct?
199.	86	With respect to para. 194, is this exercise unfair to NIP, or to some other entity?
200.	86	If to some other entity, how is it unfair?
201.	86	Could NPL have retained a property manager rather than NIP's centralized services?
202.	86	If yes, do you agree that NPL could have carried on business on a stand-alone basis?
203.	86	Ditto for NEL? Could NEL have retained a property manager rather than NIP's centralized services?
204.	86	If yes, do you agree that NEL could have carried on business on a stand-alone basis?
205.	87	What duty has the Receiver extended to NPL and its creditors in applying for a consolidation order?
206.	88(a)	With respect to para. 195, (a) whose assets were commingled?

207.	88(b)	(b) did NIP or any other entity guarantee the obligations of NPL to arm's length creditors?
208.	88(c)	(c) particularize the transfer of assets without "substantive observance of formalities" including:
209.	88(c) (i)	(i) Which assets;
210.	88(c) (ii)	(ii) Date of transfer;
211.	88(c) (iii)	(iii) Names of transferor and transferee; and
212.	88(c) (iv)	(iv) Consideration for the transfer.
213.	89	With respect to para. 197 (a), are there any "other direct liabilities of NPL which the Receiver knows about"?
214.	89	If not, isn't that a possibility regarding any corporation in receivership?
215.	90	With respect to para. 197 (b), does the Receiver compare 6% to 14% by ignoring the return to each corporation on the p.65 chart which will receive payment of related party liabilities if there is no consolidation (and therefore those proceeds would be distributed to such related parties' creditors)?
216.	90	For greater clarity, would a 6% return of related party liability to NIP be in effect a 6% return on \$33 million of such debt?
217.	91	With respect to para. 199, does the Receiver believe that in a non-receivership scenario, the creditors of NIP and NI would be able to pierce the corporate veil of NPL?
218.	92	With respect to para. 201, is the basis for which a Court may permit a bankruptcy assignment by a Receiver to reverse statutory tax priorities ...
219.	92	...and/or to exercise rights of examination under s.163(1) of the BIA?
220.	92	If not, what facts would lead a court to authorize the Receiver to assign?
<b>Questions regarding the Motion Brief of the Receiver dated June 21, 2021</b>		
221.	45?	Has the Receiver not been approving and paying the wages for all employees throughout the receivership?

222.	45?	If that is the case, can the Receiver explain why it would not already know the breakdown of liability for employees of NIP and NPL/NEL?
223.	45?	On the basis that it must already know this, explain how this point is relevant to NPL and NEL?
224.	46?	what further corporate formalities does the Receiver believe should have been followed, beyond accounting for such loans and booking them in the intercompany accounts, as was done...
225.	46?	...and reporting such intercorporate loans in the audited financial statements...
226.	46?	... and the notes to the audited financial statements as was done?
227.	47?	Is the Receiver aware of any creditors of NPL ... that are not accounted for in NPL's .. accounting records and separately disclosed on their respective trial balances?
228.	47?	Please detail the creditors' names and claims.
229.	47?	Is the Receiver aware of any creditors of ... NEL that are not accounted for in ... NEL's accounting records and separately disclosed on their respective trial balances?
230.	47?	Please detail the creditors' names and claims.
231.	48?	What evidence does the Receiver have that this was done on an inconsistent basis...
232.	48?	...or on non-commercial terms?
233.	48?	If such evidence is included in the Receiver's 12th report or any other report, please refer to the relevant pages/paragraphs/exhibits.
234.	48?	Provide documented examples of such transactions and state whether such transactions with NIP were made with NPL ...
235.	48	Provide documented examples of such transactions and state whether such transactions with NIP were made with ... NEL.
236.	49?	Has the Receiver investigated whether the development and maintenance costs were accounted for in the Intercompany accounts...
237.	49?	... and if so, what was the result of that investigation?

238.	50?	Does the property lease between NIP and NPL provide that the tenant (NIP) is to maintain and repair the property, including paying for leasehold improvements?
239.	51?	Which other Debtors?
240.	51?	The US Borrowers?
241.	51?	Does the Receiver have evidence that such employee costs were for NPL's benefit but not allocated to NPL and NEL through the intercompany accounts?
242.	51?	If not, then other than accounting services, what other employee services provided by NIP were for NPL or NEL?
243.	51?	The General Ledgers of NPL provided to AGI for 2019 and 2020 indicate total accounting transactions of 800 to 1,600 for each year. Does the Receiver agree that the cost to NIP to account for and post those transactions would be negligible?
244.	51?	If not, will the Receiver provide an estimate of what a reasonable cost attributable to NPL would be?
245.	51?	Alternatively, does the Receiver agree that a standard property management fee for an outside property manager is in the range of 5% of gross rental receipts?
246.	51?	If so, does the Receiver agree that any amount NIP would fairly allocate NPL for providing the property management services should not exceed 5% of gross revenues or roughly \$50,000?
247.	51?	The General Ledgers of NEL provided to AGI indicate total accounting transactions are in the range of 200 to 500 per year. Does the Receiver agree that the cost to NIP to account for and post those transactions would be negligible?
248.	51?	If not, will the Receiver provide an estimate of what a reasonable cost attributable to NEL would be?
249.	52?	Which Debtors records are commingled?
250.	52?	What does the Receiver mean by "commingled"?
251.	52?	How is the method by which the records are accounted for within the IT system different from the usual practices of any multi-division or multi-corporate enterprise?
252.	52?	How were financial statements and tax returns for NPL prepared year-after-year if the records were commingled?

253.	53?	What centralized services provided by NIP would have prevented NPL from operating on a stand-alone basis?
254.	54?	Explain in what manner you consider it was a consolidated approach, beyond that for notification purposes to creditors, all creditors were set out on one listing as opposed to separately listed by Debtor.
255.	54?	How many NPL creditors were notified?
256.	54?	Identify NPL's creditors.
257.	55?	Is the Receiver aware that the Audited Financial Statements are titled "Nygard Group of Companies" and that a description of the operations of the "Nygard Group of Companies" is set out in Note 1 to those financial statements, which note specifically excludes NPL and NEL?
258.	55?	In light of that, will the Receiver withdraw that allegation from its brief?
259.	56?	Would Richter advise whether real estate developers commonly use single-purpose companies for each development?
260.	56?	If so, please confirm that accounting/bookkeeping is commonly done at the developer's office for all companies in the group.
261.	56?	Please confirm that this common feature of real estate developers does not lead to consolidation of the assets and liabilities of all of the companies in the group.
262.	56?	Please also confirm that consolidation in those circumstances may lead to statutory breaches of trust by allowing trades of development A to benefit from the assets of development B.

## **APPENDIX B**

## Finley, Eric

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**From:** Bruce Taylor <GBT@tdslaw.com>  
**Sent:** Monday, July 12, 2021 1:18 PM  
**To:** Sherman, Adam; Finley, Eric  
**Cc:** Ross McFadyen; Melanie LaBossiere  
**Subject:** FW: WITHOUT PREJUDICE – SETTLEMENT MATTERS [LAW-TDS.FID1853952]

**Attention!** Courriel externe | External Email

Please see below.

Regards,

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

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**From:** Bruce Taylor  
**Sent:** Monday, July 12, 2021 12:06 PM  
**To:** Wayne M. Onchulenko <WOnchulenko@lglc.ca>  
**Cc:** Ross McFadyen <RAM@tdslaw.com>; Melanie LaBossiere <MML@tdslaw.com>  
**Subject:** RE: WITHOUT PREJUDICE – SETTLEMENT MATTERS [LAW-TDS.FID1853952]

Wayne, thank you for your June 25, 2021 3:17 PM message below. Your settlement proposal is not acceptable to the Receiver. Without limiting the ability of the Receiver to respond more fully as circumstances warrant, we note the following in respect of the text of your message:

Respectfully, your analysis is based on a number of fundamentally flawed premises:

### Allocation

1. In regard to the allocation of disbursements, receivership expenses and corporate overhead (collectively, "Costs"), you assert that ". . . assessing the costs of the receivership fairly attributable to NPL would be simple: those would be the costs directly attendant upon the marketing and sale of the NPL properties, and the costs of the November 2020 motion respecting the Inkster Property. The balance of the proceeds should be credited to NPL's payment under its guarantee, which balance, I repeat, would exceed \$20 million." You appear to assert that NPL's contribution to Costs should be approximately [REDACTED], such that there are [REDACTED] in "net" NPL asset proceeds. It is not at all clear how you come up with the amount of what you assert should be NPL's allocation of costs, but it is clear that, for example, you are asserting that NPL should, for example:

- (a) apparently bear no portion of the corporate payroll costs, although these costs represent payments to employees who provided (and historically provided) administrative services for the benefit of each of the Respondents, including NPL and, in some cases, services specifically for NPL alone;
- (b) bear a portion of the Receiver's *legal costs* limited to only the "November 2020 motion", although, for example, NPL actively took positions in relation to the court motions (whether ultimately opposing them or not) dealing with the General Order, the DEFA Order, each of the orders dealing with the sales of the Toronto/Notre Dame/Inkster and Broadway properties, and the Edson's/Brause settlement order and related matters, and actively participated in the course of the negotiation of the Edson's/Brause Settlement; filed an appeal of the Inkster Sale Approval Order and contested the Receiver's Court of Appeal Motion regarding the stay; and contested the approvals of the Receiver's

accounts, requiring the preparation and filing of affidavits from the Receiver, TDS and Katten. The motion for discharge of the Receiver and to “stop” the sale of the Inkster Property also initiated the “Fawcett Review” and time and effort related to that review. Your client raised issues as to tenancy at the Notre Dame Property, and was directly involved in the “proceeds preservation” issues arising from the sales of the Falcon Lake and Fieldstone properties. NPL should certainly bear a share of the Receiver’s legal costs related to other actions taken in these proceedings purportedly on behalf of all of the Respondents. In the result, the issues raised and positions taken by NPL, and the huge amount of time required to be taken by Receiver’s counsel to address those issues and positions over the course of the Receivership, have been major contributors to the Receiver’s legal fees and expenses, and the Receivership Order specifically charges the Property (which includes the Toronto Property, the Notre Dame Property, the Inkster Property and the Broadway Property) with the Receiver’s legal costs;

(c) bear no portion of the *Receiver’s* fees and costs associated with the Receivership and its conduct generally, and, apparently, none of the time and expenses of the Receiver in addressing the many actions and issues involving NPL over the course of the receivership as discussed above. The issues raised and positions taken by NPL, and the huge amount of time required to be taken by the Receiver to address those issues and position over the course of the Receivership, have been major contributors to the Receiver’s fees and expenses, and the Receivership Order specifically charges the Property (which includes the Toronto Property, the Notre Dame Property, the Inkster Property and the Broadway Property) with the Receiver’s fees and costs; and

(d) bear no portion of the Landlords’ Charge, notwithstanding that the Landlord Terms Order specifically charges the Property (which includes the Toronto Property, the Notre Dame Property, the Inkster Property and the Broadway Property) with the Unpaid Rent costs, and that the business conducted on the leased premises affected by the Landlords’ Charge funded, for example, the common administrative expenses, the benefits of which were shared by NPL.

Certainly, where legal or Receiver costs are properly attributable to one of the entities that does not have assets to pay the costs (for example, costs associated with responses to the SDNY subpoenas, which were directed to Nygard, Inc. (“NI”)), there is no reason that NPL should not bear the burden of an equal share of those costs.

It is important to note that NPL did not challenge the granting of the Receiver’s Charge, and, in fact, did not appeal the granting of any of the Receiver’s Charge, the Receiver’s Borrowing Charge or the Landlords’ Charge.

It is unquestionable that attempting to separate out Costs on the basis of a more detailed allocation than that set out in the Twelfth Report, if at all practicable, would be a complex, time-consuming and expensive exercise for the reasons described in the Twelfth Report and it remains the Receiver’s view that the result of a more detailed allocation would be to increase the allocation of Costs to NPL beyond the \$5.805MM amount that is described at paragraph 104 of the Twelfth Report, not reduce them as you have suggested.

## **Subrogation**

2. On the basis of *your* allocation of Costs, you assert, without describing any basis or justification, that **all** remaining NPL asset proceeds (in the amount of ██████████) were applied to repay the debt and satisfy other obligations (the “**Lender Debt**”) to the Lender of the borrowers (the “**Borrowers**”) of the Lender Debt (i.e. the US Respondents). As a matter of fact, the Lender Debt was largely repaid before the sales of the Inkster Property and the Broadway Property were completed. So, it is not possible that all remaining NPL asset proceeds (whatever the correct amount after allocation of Costs) were applied to repay Lender Debt. The net sale proceeds from the Broadway Property (totaling ██████████) and only a portion of the net sale proceeds from the Toronto Property (totaling ██████████) were paid by the Receiver to the Lender. So, as a factual matter, assuming that no share of the allocation of Costs is made as against proceeds from the sales of the Toronto Property and the Broadway Property, the most that can be argued to have been applied to Lender Debt from NPL asset proceeds is ██████████. The allocation of this somewhat lower amount to payment of Lender Debt would not materially affect the outcome of the Separate Corporation Analysis described in the Twelfth Report. If the amount of ██████████ was used as the contribution to repayment of Lender Debt from NPL



asset proceeds, it would be necessary to increase the allocation of Costs (i.e. the allocation to payment of court-ordered charges) to NPL asset proceeds, as more of those proceeds would have been required to be used to fund the payment of Costs.

The Separate Corporation Analysis included in the Twelfth Report (i) allocates Costs, (ii) attributes payment to the Lenders in full of remaining NI asset proceeds to payment of Lender Debt, on the basis that NI was a Borrower, (iii) and then allocates the balance of payment of the Lender Debt equally as between NIP and NPL asset proceeds. This equal allocation is based on the fact that, pursuant to the Credit Agreement, the Lender could have chosen to recover from the Guarantors as the Lender saw fit. The Lender was not constrained to recover from NPL or NIP first; and, subject only to the limit of NPL's guarantee (which does not come into play in this case), the Lender could have chosen to recover the balance of the Lender Debt from NIP and NPL in such proportions as it saw fit. In those circumstances, and in an effort to fairly balance the interests of stakeholders of NIP and NPL, the Receiver has proposed an equal allocation of repayment of the Lender Debt as between NIP asset proceeds and NPL asset proceeds.

3. While you appear, in the result, to assert that all remaining NPL asset proceeds (which you calculate to be in the amount of [REDACTED]) were used to repay Lender Debt, your analysis is confusing. Elsewhere in your proposal you assert that [REDACTED] of NIP asset proceeds were paid towards Lender Debt. Those two amounts [REDACTED] total over [REDACTED], which is approximately [REDACTED] in excess of the actual outstanding Lender Debt. Further, your second chart suggests a different total payment of Lender Debt, which is also greater than the amount of Lender Debt actually repaid. Based on the amounts of the intercorporate debts described in that second chart, and your earlier assumptions, it appears that you are asserting that (i) NPL asset proceeds in the amount of [REDACTED] were paid towards Lender Debt and (ii) at the same time, NIP asset proceeds in the amount of [REDACTED] were paid towards Lender Debt (i.e. [REDACTED] is the alleged debt owed by NIP to the Borrowers – the second chart shows a remaining debt of \$7.7MM from NIP to the Borrowers, hence [REDACTED] must have been “paid” by NIP to the Borrowers to repay Lender Debt). Firstly, those two amounts [REDACTED] total [REDACTED], which is approximately [REDACTED] more than the amount of the outstanding Lender Debt. Secondly, the [REDACTED] amount is not consistent with your assertions that *all* net NPL asset proceeds (which you calculate to be [REDACTED] were applied to pay Lender Debt, and the [REDACTED] amount of NIP asset proceeds is not consistent with your earlier assertion that [REDACTED] of NIP asset proceeds were used to repay Lender Debt.

4. You assert that payments by the Receiver of NPL asset proceeds towards repayment of Lender Debt should be treated differently than payments by the Receiver of NIP asset proceeds towards repayment of Lender Debt:

(a) you assert that NPL asset proceeds paid towards repayment of Lender Debt are payments by NPL under its guarantee of the Lender Debt, resulting in rights (“**Subrogation Rights**”) under *The Mercantile Law Amendment Act* (Manitoba) in favour of NPL. You also assert that such payments result in the creation of an intercompany debt from the Borrowers to NPL;

(b) you assert that NIP asset proceeds paid towards repayment of Lender Debt are *not* payments by NIP under its guarantee of the Lender Debt, but rather are only repayments of an intercompany debt owing by NIP to the Borrowers, such that payments of NIP asset proceeds do *not* result in Subrogation Rights in favour of NIP.

5. There is no basis for treating or characterizing these payments differently. Both NIP and NPL are guarantors. In the context of the receivership, the Receiver is, legally and as a practical matter, not entitled to use NPL asset proceeds to make loans to the Borrowers, and is not entitled to use NIP asset proceeds to repay loans owing to the Borrowers. The Receiver *is* legally entitled (and, in fact, is obliged) to use NPL asset proceeds and NIP asset proceeds to repay Lender Debt, as priority payments, subject only to using such proceeds for the payment of the Receiver's Charge and the Receiver's Borrowings Charge. The Receivership Order (at paragraph 5(c)) specifically directs the Receiver to “remit to the Lenders (as defined in the Dean Affidavit)”, **on behalf of the Debtors** (without any liability in respect thereof), **any and all proceeds from Property in repayment of amounts outstanding in respect of the Credit Agreement** (as defined in the Dean Affidavit)” (emphasis added).

6. Respectfully, you are confusing the payment transactions with the accounting treatment for the payment transactions. Repayments of Lender Debt from both NPL asset proceeds and NIP asset proceeds are guarantee payments. The proper **accounting treatment** for those payments may be to (i) account for the payments from NPL asset proceeds as recording an intercompany claim as against the Borrowers to NPL, and to (ii) account for the payments from NIP asset proceeds as recording an intercompany claim as against the Borrowers to NIP, however, the accounting treatments ought to define the **character** of those payments – both are guarantee payments; both result in Subrogation Rights.

7. If you wish to make the assertion that any payments of NIP asset proceeds to the Lenders are a repayment of a preexisting intercompany obligation as between NIP and the Borrowers (i.e. characterize the payments on the basis of what you allege to be the proper accounting treatment), then the accounting treatment should equally define the character of the payments made from NPL asset proceeds. On your analysis, **both** would have the primary character of simply being intercompany transactions rather than guarantee payments, and neither would result in Subrogation Rights.

8. Respectfully, your proposal discloses a fundamental misunderstanding of Subrogation Rights, which properly include the following:

(a) while (depending on the loan/guarantee terms), a lender can claim disproportionate amounts from guarantors as it sees fit, as among co-guarantors the liability of any guarantor is limited to the guarantor's proportionate amount of the outstanding principal debt only;

(b) Subrogation Rights include rights of a guarantor to enforce the original lender's security. If that security includes accounts receivable, Subrogation Rights include the ability of the guarantor to, in a proper case, enforce collection of such accounts receivable - it does not result in the assignment of the accounts receivable to the guarantor; and

(c) Subrogation Rights in favour of NPL do not make NPL a "secured creditor" of its co-guarantor, NIP, but rather allow NPL to enforce the Lender's security in a manner which equalizes the burden across all co-guarantors. That is, subrogation rights in favour of NPL cannot be used by NPL to enforce on the Lender's security in a manner which would result in NIP bearing a greater portion of the debt than its proportionate share.

9. In this case, there are 5 guarantors. The outstanding balance of the Lender Debt is \$28.384MM. Accordingly, as among guarantors, the limit of each guarantor's liability is  $(28.394/5)$  approximately \$5.678MM (say, \$5.7MM). Using your numbers, on the assumption that NPL Proceeds Payments totaled (approx.) \$27.2 MM, and (therefore) NIP Proceeds Payments totaled (approx.) \$1.2MM, the total liability of NIP to NPL for contribution on the basis of the alleged NPL Subrogation Rights is  $(5.7-1.2)$  \$4.5MM. On that basis, NPL would be subrogated to the Lender's security in remaining NIP asset proceeds to the extent of \$4.5MM. This would be a direct claim of NPL (exercising Lender secured rights) as against NIP assets. It would have no effect on the intercompany balance of NEL's debt to NIP, and represents the totality of Subrogation Rights that NPL could exercise as against NIP and its assets.

10. Subrogation Rights do not result in some "separate" claim that NPL could assert against NIP based on the alleged NIP intercompany debt to the Borrowers that you assert arises from the treatment of Lender loan advances. Subrogation Rights do not result in NPL "owning" the debt that you allege NIP owes to the Borrowers, and do not result in NIP *owing* that intercompany debt to NPL, allowing NPL to somehow then "trade" in set-offs to eliminate or reduce the debt that NEL owes to NPL, in whole or in part, in addition to exercising Subrogation Rights directly against NIP asset proceeds. NPL cannot purport to do indirectly what it cannot do directly, thereby somehow "realizing" as against NIP for an amount greater than \$4.5MM.

11. In the result, whether Subrogation Rights are attributed to NIP or not:

(a) in reference to your "Scenario One", [REDACTED]  
[REDACTED] On your numbers, the totality of NIP's contribution exposure to a subrogated claim in favour

of NPL is \$4.5MM only, which (if your numbers are correct) can be claimed as against NIP asset proceeds directly, based on enforcing Lender security as against NIP assets to the limit of NIP's "co-guarantor" contribution liability;

(b) your Scenario Two similarly fails if Subrogation Rights in favour of NPL are properly applied; and

(c) NEL remains indebted to NIP in the amount of \$18.1MM, such that there is no outcome that results in equity in net receivership proceeds in NPL in excess of its liabilities and its exposure to NEL's debt to NIP.

### **Treatment of Lender Advances**

12. While it is irrelevant to the outcome of the separate corporation analysis/subrogation matters, we note that, should it be necessary to calculate accurately, the calculation of any intercompany obligation of NIP to the "Borrowers" arising from Lender loan advances, is not simple, and would not result in an intercompany obligation of NIP to the Borrowers in an amount as great as \$33.1MM. The initial loan advance included substantial amounts to pay transaction costs, which would be costs attributable to the Borrowers. While NIP was the borrower from BMO, repayment of BMO debt involves repayment of amounts of BMO debt used for the purposes of Respondents other than NIP, based on the manner in which the Nygard Group centralized its banking and conducted business. Subsequent borrowings from the Lender based on Borrowing Base Certificates included amounts borrowed to fund payment of obligations of not just NIP, but other Respondents. As a result, it would be a complicated matter to properly attribute the use of the Lender advances and the resulting intercompany treatment.

As a further note, your text makes reference to "*... the accounting treatment of the Lender's advances which the Receiver believes is correct (i.e. it includes an amount due from NIP to the Borrowers resulting from the Lender's advances being paid directly to NIP rather than to the Borrowers.)*". As noted above, the calculation of obligations arising from the treatment of Lender advances is complex. In fact, an amount of only \$1.575MM from the initial Lender advance was "paid directly to NIP", and the fact that Lender advances at anytime were made to the NIP bank account is not determinative of intercompany obligations, as, because of the consolidated manner in which the Respondents carried on business, only NIP had bank accounts (other than a minor NI disbursement account) and accordingly all transactions related to all Respondents were transacted through the NIP account.

### **Consolidation**

13. The Receiver is satisfied that the facts and evidence are overwhelmingly in favour of consolidation and that the tests for consolidation in both Canada and the US are met for the reasons and on the bases set out in the Receiver's Twelfth Report. Respectfully, your analysis appears to deliberately ignore many elements of consolidation that are clearly present and, without limiting the Receiver's ability to more fully respond to your assertions, appears to misstate facts in respect of at least four of the factors you delineate.

While your proposal below is not acceptable, the Receiver is prepared to consider and discuss settlement arrangements taking into account, on some basis, the Preserved Proceeds, as we have discussed with you.

Regards,

G. Bruce Taylor  
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"he/him"



