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(Winnipeg Centre)
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(USA) Limited et al.
Cited as: 2020 MBQB 58

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO
SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. C. B-3, AS AMENDED, AND SECTION 55 OF
THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280,
AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,
applicant,

- and -

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

respondents.

) **APPEARANCES:**

)
) Marc Wasserman, Jeremy
) Dacks, Catherine Howden and
) Eric Blouw
) for the applicant

)
) Wayne Onchulenko
) for the respondents

) Bruce Taylor, Ross McFadyen
) and Melanie LaBossiere,
) articling student
) for Richter Advisory Group Inc.

)
) David Jackson, Shayne
) Kukulowicz and Hylton Levy
) for proposal trustee, A. Farber
) & Partners Inc.

)
) Judgment delivered:
) March 26, 2020

EDMOND J.

Introduction

[1] The applicant, White Oak Commercial Finance, LLC applies pursuant to s. 243 of the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3, as amended ("**BIA**") and s. 55(1) of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280, as amended ("**QB Act**") for the appointment of Richter Advisory Group LLP ("Richter") as receiver without security, of all assets, undertakings and properties of the respondents. On March 18, 2020, the court granted a receivership order and advised the parties that brief reasons for decision would be delivered following the hearing. These are those reasons.

[2] By way of background, this matter proceeded in court on Tuesday, March 10, 2020 and was adjourned to Thursday, March 12, 2020, to permit the respondents to file responding affidavit material. Interim orders were made to preserve the status quo pending the hearing on the merits.

[3] The respondents are identified in the affidavit material as the corporate entities operating retail, wholesale and business operations of the Nygård clothing and fashion business in Canada and the USA ("Nygård Group"). As at March 12, 2020, the Nygård Group operated 169 retail stores in Canada and the USA, operated a wholesale business and employed approximately 1450 employees.

[4] The respondents filed an affidavit of Greg Fenske, affirmed March 11, 2020 and a supplemental brief for the hearing that proceeded on March 12, 2020. After hearing submissions from all parties, the court reserved its decision on whether Richter should be appointed as a receiver and ordered the Nygård Group to continue to fully comply with

the terms of the Credit Agreement entered into with Lenders, Second Avenue Capital Partners LLC and White Oak Commercial Finance, LLC ("Lenders") dated December 30, 2019 ("Credit Agreement") and that no Collateral (as defined in the Credit Agreement) would be disposed of outside of the ordinary course of business without the prior written consent of the applicant and the proposal trustee, A. Farber & Partners Inc.

[5] During the course of the hearing on March 12, 2020, the court was advised that the Lenders advanced funds to the Nygård Group to fund their payroll due on March 12, 2020. The payroll funding was advanced by the Lenders because the Nygård Group had not confirmed that sufficient funds were deposited in the Nygård corporate account, by way of cash injection, to fund the payroll which was to be paid out by electronic fund transfer to employees. The Nygård Group had confirmed before the March 12, 2020 hearing that the payroll would be funded by way of a cash injection. Paragraph 10(a) of the proposal trustee's first report states:

the Proposal Trustee attended on a call with representatives of the Nygard Group where the Proposal Trustee was advised that (i) funds sufficient to satisfy the payroll obligation had been deposited with the Nygard Group and evidence of such funding had been provided to Osler as required by the Winnipeg Court; (ii) the short term primary focus of the Nygard Group was to obtain funds to repay the Lenders in full so as to permit the Nygard Group to focus on a restructuring and rationalization of its business.

[6] Contrary to the representations made to the proposal trustee, the Nygård Group did not deposit the necessary payroll funds. The Lenders therefore funded the payroll to ensure that the employee payroll was not interrupted during this crucial time frame. During the course of the hearing on March 12, 2020, counsel for the Nygård Group

advised that an advance of payroll funding had been received and the Lenders' advance of payroll would be reimbursed from those funds.

[7] The court was further advised later in the afternoon during the same hearing held March 12, 2020 that the payroll advance had been transferred from the Nygård Group bank account to a bank account of Edson's Investments Inc. The supplementary affidavit of Robert L. Dean affirmed March 17, 2020, states that Edson's Investment Inc. is an entity controlled by Mr. Nygård which is not part of the Nygård Group named as respondents in this proceeding and is not a party to the Credit Agreement.

[8] The primary submission advanced by the respondents at the March 12, 2020 hearing was that the Canadian entities had filed Notices of Intention to make a Proposal in Bankruptcy ("NOIs") pursuant to s. 50.4 of the **BIA**, the stay of proceedings pursuant to s. 69(1) of the **BIA** applied and accordingly, the court should permit the proposal process to continue and stay the applicant's proceeding. Further, Nygård Group submitted that they had more than sufficient equity to pay out the Lenders in full and intended to have a proposal to do so by March 20, 2020.

[9] On March 13, 2020, the court provided oral reasons for decision regarding the application and the motion made by the applicant to lift or terminate any stay of proceedings granted regarding the proposal process. To summarize, the court ordered:

- a) The proper jurisdiction to hear the application and the NOI proceedings is Manitoba;
- b) The NOI proceedings are not invalid or a nullity and the proposal proceedings should proceed in this court;

- c) The draft cash flow statements prepared by the Nygård Group and provided to the proposal trustee must be provided to counsel for the applicant;
- d) The application by the Lenders for the appointment of Richter as the receiver was adjourned until Friday, March 20, 2020;
- e) The respondents were directed to continue to fully and promptly comply with all terms and provisions of the Credit Agreement and all documents ancillary thereto, and, without limitation, comply with s. 6.10 of the Credit Agreement;
- f) Until further of the court, no steps would be taken by the respondents to dispense with or dispose of Collateral, as that term is defined in the Credit Agreement, other than:
 - i. by way of the sale of Collateral at the respondents' retail outlets in the ordinary course of business of such retail outlets; or
 - ii. with the advance written consent of the applicant and the proposal trustee;
- g) All additional responding affidavit material must be filed in court by no later than 2:00 p.m. on Thursday, March 19, 2020;
- h) In accordance with the undertaking given by counsel for the Nygård Group, the court directed the Nygård Group to return the payroll funds that were earmarked for payroll, which funds were transferred or removed from the Nygård Group corporate bank account on March 12, 2020;
- i) The application was adjourned and the motion by the applicant to terminate or lift the stay of proceedings in effect pursuant to s. 69(1) of the **BIA** was denied at

that time, although the court stated that the imminent necessity for appointing a receiver may change if reasonable steps were not taken by the Nygård Group to pay the outstanding indebtedness to the applicant and/or further evidence established that the Nygård Group failed to comply with the Credit Agreement during the period of the stay;

- j) The respondents were given one week to cooperate with the proposal trustee in the proposal process in accordance with the **BIA** and act in good faith and with due diligence, including take reasonable steps as noted above.

New Evidence Received since March 13, 2020

[10] A further affidavit affirmed by Robert L. Dean on March 17, 2020, confirmed, among other things:

- a) The funds that the Nygård Group was supposed to have deposited in the Nygård Group bank account sufficient to satisfy the payroll obligation was not deposited. Funds were deposited, but then were removed or transferred out as noted above.
- b) The proposal trustee forwarded a cash flow forecast to applicant's counsel during the March 12, 2020 hearing and the cash flow forecast contemplated continued funding by the Lenders despite the termination of the funding commitment.
- c) A funding request from the Nygård Group included approximately \$1.032 million Canadian for payroll, source deductions and rent. The Nygård Group provided no indication of how they intended to fund the payroll for the week of March 15, 2020.
- d) On March 15, 2020, the Lenders responded to the Nygård Group's funding request advising they were prepared to provide funding on the following terms:

- (a) The Lenders will fund the advance request (subject to review by Richter);
- (b) The Nygard Group will engage a third-party liquidator to negotiate with Perry Ellis and liquidate US wholesale (and other assets immediately available for sale);
- (c) The Nygard Group will confirm that the Lenders are authorized to speak to wholesale customers and Perry Ellis;
- (d) The proceeds of any wholesale sale shall be immediately repaid to the Lenders;
- (e) White Oak will receive a release from the Loan Parties and Peter Nygard on the same terms as White Oak previously communicated in the pay-off letter it previously provided, which shall be effective immediately;
- (f) The Nygard Group will agree to remove the \$20 million cap on the real estate Collateral;
- (g) The Nygard Group will sign up a stalking horse (sic) bidder (with an approximately 10% deposit) with respect to the sale of the Toronto real estate, with any deal to close in 30 days (subject to a higher and better bid at auction);
- (h) The Nygard Group will pay a \$500,000 accommodation fee if the amounts owed to the Lenders are not repaid in full on or before March 20, 2020;
- (i) The Nygard Group will agree to consent to the appointment of a receiver if the amounts owed to the Lenders are not repaid in full by March 20, 2020.

The Nygård Group did not respond to the Lenders' proposal.

e) On March 16, 2020, counsel for the applicant wrote to the proposal trustee regarding the payroll advance. On the same day, Richter wrote to the proposal trustee making inquiries about the continuing erosion of the Collateral requesting numerous updates, including:

- (a) The status of discussions with Perry Ellis with respect to the U.S. wholesale inventory;
- (b) The status of discussions with Great American on the potential refinancing of the Lenders' secured debt;
- (c) The status of discussions with the party interested in the Toronto real property located at 1 Niagara St.;
- (d) The Nygard Group's funding requirements for the current week and its plans on meeting its obligations on a go-forward basis.
- (e) The return of the Late Transfer Funds that Mr. Nygard transferred out of the Nygard Group's bank account;
- (f) The timing on receipt of a realistic cash flow forecast given the Nygard Group's current circumstances;

- (g) The Nygard Group's plans to continue normal course operations given the closure of its Winnipeg and Toronto offices, including the potential layoff of corporate staff; and
- (h) The Nygard Group's plans to curtail expenditures in the coming weeks in response to the significant decrease in retail sales.

- f) The Nygård Group closed all of its distribution centres effective the evening of March 13, 2020, after courier and transportation companies refused to provide go forward service without guarantee of payment.
- g) On March 17, 2020, the applicant received a copy of an e-mail from the Nygård Group indicating that the Nygård Group would be immediately shutting down its retail stores and website due to the recent COVID-19 outbreak. The e-mail made numerous additional representations about the Lenders' actions, which the Lenders submit are false and materially impact the Lenders' ability to realize on their Collateral.
- h) The Nygård Group did not consult with the applicant, Richter or the proposal trustee regarding the potential closure of the retail stores and their business operations.
- i) The Lenders have no faith that proper procedures to protect their Collateral will be undertaken by the Nygård Group.

[11] On March 17, 2020, the proposal trustee issued its second report. The report confirms the following:

- a) The proposal trustee requested that Nygård Group and management provide the proposal trustee with information respecting:
 - (a) the status of the reimbursement of the Payroll Funding;

- (b) the status of funding for ongoing operations during for the week ending March 20, 2020;
- (c) the cash flows and the underlying assumptions., drafts of which were prepared by each of the members of the Nygard Group and provided to the Proposal Trustee on the evening of Wednesday, March 11, 2020 and the four wall forecasts provided on Sunday March 16, 2020;
- (d) the status of operations of the Nygard Group including measures being taken in response to the Covid-19 crisis (i.e. whether or not the stores and/ or distribution centres are to remain open);
- (e) financial information relating to the Nygard Group's operations;
- (f) electronic contact information for all employees of the Nygard Group (or access to internal email system) to provide the statutory required notices of the NOI proceedings; and
- (g) the status of refinancing efforts of the Nygard Group.

- b) Despite repeated requests for information, limited information was provided to the proposal trustee as established in the e-mails sent by the proposal trustee attached as Exhibits B and C to the second report.
- c) The proposal trustee received information from the Nygård Group regarding efforts to sell real property located at 1 Niagara Street in Toronto, Ontario (the "Toronto Property"). The potential purchaser indicated that the offer to purchase is confidential. The proposal trustee advised the Nygård Group that it is not in a position to advise the court or stakeholders that the offer is fair or reasonable.
- d) The proposal trustee received a copy of a notice entitled "Nygård closing 180 retail stores". The proposal trustee was not consulted in advance of the notice.
- e) The second report concludes:

20. Based on the foregoing, the Proposal Trustee is not in a position to advise that the Nygard Group is acting with good faith or due diligence at this time.

21. The Proposal Trustee also notes that each of the members of the Nygard Group are required under the BIA to file cash flows by no later than Thursday, March 19, 2020 and such cash flows must be submitted to the OSB with a report from the Proposal Trustee on the reasonableness of the assumptions contained therein. The Proposal Trustee has not been

provided with sufficient information to assess the draft cash flows provided and is of the view that it will not be in a position to file the required report on the reasonableness of the assumptions as required by the BIA.

[12] Two affidavits affirmed by Greg Fenske, on March 18, 2020, were received by the court. The second affidavit is a confidential affidavit regarding the potential sale of the Toronto Property and the sale of certain inventory.

[13] The first affidavit responds to the affidavit of Mr. Dean affirmed March 17, 2020 and can be summarized as follows:

a) An explanation is provided as to why the Nygård Group was unable to fund payroll.

The Nygård Group requisitioned \$1 million U.S. from an account at Stifel and the funds never made it into Nygård's Canadian bank accounts.

b) Nygård Group obtained a loan from Edson's Investments Inc. in the amount of \$500,000 U.S. to fund payroll. These funds were returned or transferred back to Edson's Investments Inc. when the applicant provided the funds for payroll on March 12, 2020. While Mr. Fenske states the Nygård Group will receive funds from Stifel, as at March 18, 2020, no funds were received.

c) Nygård Group did advise the Lenders of the funds that were required to pay bills in accordance with the Credit Agreement.

d) The estimated payroll for the week of March 15, 2020, is \$900,000 Canadian and "that will be funded by the Nygård Group resources". (it is unclear what that term refers to and if it is an entity, it is not a named respondent)

e) The Nygård Group received a verbal offer from Perry Ellis to purchase one-half of the inventory in the U.S. The amount is disclosed in the confidential affidavit.

- f) While a proposal to pay out the Lenders was to be received from Great American Capital, no proposal was received and the Nygård Group has moved on to having discussions with other Lenders to pay out the secured debt. No concrete proposal was presented.
- g) The offer to purchase the Toronto Property dated March 16, 2020 from New York Brand Studio Inc., in Trust, was attached as Exhibit B to Mr. Fenske's affidavit and the purchase price is redacted. The confidential affidavit discloses the purchase price and the amount is substantially different from the purchase price that was included in the earlier affidavit affirmed by Mr. Fenske on March 12, 2020.
- h) Nygård Group states that cash will be coming in from the sale of assets until the stores are reopened.
- i) Nygård Group unilaterally laid off 1370 employees and provides reasons for closing the offices and stores for the safety of the employees and customers as a result of the COVID-19 virus. Nygård Group confirms that the Lenders and the proposal trustee were not consulted prior to making the decisions.
- j) The Nygård Group plans to sell real property and generate \$25.4 million and pay \$20 million to the applicant pursuant to the Lenders' security.
- k) Mr. Nygård will divest ownership and all Nygård Group of companies will continue under different ownership allowing the purchasers to move forward with the current employees of the Nygård Group.
- l) The affidavit provides information regarding the steps taken by Nygård Group to market the sale of assets. Mr. Fenske states that the consideration to be paid

under the purchase and sale agreement of the Toronto Property " ... is reasonable and fair and is substantially higher than a liquidation value of the Nygård Group of companies assets in a Bankruptcy or Receivership." (See para. 29 of the affidavit of Greg Fenske affirmed March 18, 2020)

- m) The proceeds from the sale of the Toronto Property and sale of inventory is to be paid to the applicant with the remainder of the monies, if any, to go to the proposal trustee to make a proposal to pay the remaining creditors.
- n) The respondents seek an administrative charge to pay the proposal trustee and counsel for the proposal trustee.
- o) Although no motion was filed, the respondents seek an extension of time of 30 days for the Nygård Group to make a proposal in bankruptcy.
- p) Mr. Fenske states " ... the Nygård Group of companies has acted, and is acting, in good faith and with due diligence in the proposal proceedings to date." (See para. 38 of the affidavit of Greg Fenske affirmed March 18, 2020)

Analysis and Decision

[14] The starting point for analysis is to determine whether the applicant has met the test for appointing a receiver pursuant to s. 243 of the **BIA**. Section 243(1) of the **BIA** and s. 55(1) of the **QB Act** provide that a receiver may be appointed on application by a secured creditor, where it is "just or convenient" to do so. Such an order may authorize the receiver to:

243(1)

. . .

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

[15] On February 26, 2020, the applicant sent a notice of intention to enforce security as required pursuant to s. 244(1) of the **BIA**.

[16] I am satisfied on the basis of my review of all of the evidence, that it is just and convenient to appoint a receiver in the circumstances. I considered the factors outlined in the various authorities including:

- a) Whether irreparable harm may be caused if no order is made, although such a requirement is not essential where, as in this case, the appointment of a receiver is authorized by the security documentation including the Credit Agreement. In this case, I am satisfied that irreparable harm may be caused if no order is made due to the various steps that have been taken by the Nygård Group as I will outline below;
- b) The risk to the Lenders taking into consideration the Nygård Group equity in the assets and the need for protection or safeguarding of the assets;
- c) The nature of the property, including real property and inventory and the potential that the value of the inventory is being materially impacted by steps taken by the Nygård Group.

- d) The balance of convenience to the parties which, in my view, favours the appointment of the receiver to ensure the assets are protected, marketed in an appropriate manner to secure the highest market value and to take reasonable steps to ensure that employees of the Nygård Group are protected.
- e) The fact that the applicant has the right to appoint a receiver under the Credit Agreement.
- f) The principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly. The evidence satisfies me that the appointment of a receiver is necessary, just and convenient in the circumstances.
- g) I also considered the effect of the order on the parties, the conduct of the parties, the length of time that the receiver may be in place, the cost to the parties and the likelihood of maximizing return to the parties. All of these factors favour appointing a receiver in the circumstances. (See ***Bank of Nova Scotia v. Freure Village on Clair Creek et al.***, 1996 CanLII 8258, [1996] O.J. No. 5088; ***Callidus Capital Corporation v. Carcap Inc.***, 2012 ONSC 163, [2012] O.J. No. 62; ***Romspen Investment Corp. v. 6711162 Canada Inc.***, 2014 ONSC 2781, [2014] O.J. No. 2146; ***Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.***, 2010 BCSC 477, [2010] B.C.J. No. 635; and ***CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd.***, 2019 MBCA 95, [2019] M.J. No. 246 (QL))

[17] I previously found, as outlined in my reasons for decision given March 13, 2020, that the evidence filed presented a " ... strong basis and rationale for the applicant to be concerned about the stability of the Nygård Group and in my view justifies the applicant

taking steps to enforce its security and seek immediate repayment of the outstanding indebtedness. The Dean affidavit outlines in considerable detail the breaches of the Credit Agreement. (Exhibit D to Mr. Dean's affidavit) and the reason why the applicant has lost all confidence and faith in the Nygård Group complying with the governing Credit Agreement."

[18] Had the Canadian Nygård entities not filed the NOIs, I would have had no hesitation in granting the receivership order last week. As explained in my reasons for decision delivered March 13, 2020:

The proposal provisions of the *BIA* permit insolvent persons to avoid or postpone bankruptcy by complying with the provisions by appointing a proposal trustee and making a proposal to all creditors, including secured creditors. The proposal trustee must review Nygård Group cashflow statements and the proposal for their reasonableness and file reports in court. The proposal trustee monitors the debtors and must report regarding any material adverse change to creditors without delay after receiving information regarding any changes, which adds transparency to the proposal process.

The proposal trustee is an officer of the court and must impartially represent the interests of creditors. If the proposal trustee knows of dispositions, transfers of property or steps taken by the debtor that are material, the proposal trustee must disclose that information to creditors so that they may take such action as they deem appropriate.

It is necessary for the court to weigh the interests of all creditors in the proposal process and the interests of the primary secured party, the applicant. I am satisfied that it is in the best interests of all of the creditors to permit the respondents to restructure and make a viable proposal to the creditors pursuant to the proposal process.

That said, I am not satisfied that Nygård Group has been dealing with its lenders in good faith and the appropriate action to take is to impose deadlines on the Nygård Group to satisfy the statements made in the Fenske affidavit and made orally by the respondents' counsel in court yesterday.

In my view, it is premature to terminate or lift the 30 day stay period, particularly in light of the representations that the Nygård Group has made to this court. I am not satisfied that there is no viable proposal that can be made by the respondents as submitted by the applicant.

The evidence filed by the respondents suggests that a viable proposal may be made to creditors and to the applicant. While there is evidence that the respondents have not acted in good faith and with due diligence in their dealings with the applicant, I direct that the respondents must continue to comply with the terms and conditions of the credit agreement and ancillary documents pending receipt of the outcome of the negotiations that are presently being undertaken to pay out the indebtedness of the applicant by March 20, 2020.

I am not satisfied that the applicant will be materially prejudiced by the continuing operation of the stay of proceedings, so long as the respondents are making good faith efforts to continue to operate the Nygård Group business in the best interests of all stakeholders, including making arrangements to continue to meet the payroll and pay its employees and taking immediate steps to finalize financing to pay the outstanding indebtedness of the applicant by March 20, 2020.

In the meantime, over the course of the next week, the respondents are ordered and directed to provide RAG ongoing access to financial information by virtue of the inspection rights under the credit agreement. The Nygård Group must not dispose of any assets or transfer shares or transfer funds deposited in the corporate bank accounts to other bank accounts other than in the ordinary course of business without consent of the proposal trustee, the applicant and RAG.

If necessary, the court will make a determination if there is a dispute about a step proposed to be taken by the Nygård Group. In other words, all business of the Nygård Group, including transactions, shall continue in the ordinary course of business and in accordance with the strict terms of the credit agreement.

[19] The further evidence that has been filed since March 13, 2020, satisfies me that the Nygård Group has not been acting in good faith and with due diligence. I am also satisfied that the Nygård Group cannot be left as a debtor in possession and the proposal process cannot continue. The second report from the proposal trustee states that the proposal trustee is not in a position to advise that the Nygård Group is acting with good faith or due diligence at this time. Further, the proposal trustee was not provided with sufficient information to assess the draft cash flows provided and is not in a position to file the required report on the reasonableness of the assumptions as required by the **BIA**.

[20] As a result of the Nygård Group failing to provide accurate and timely information to the proposal trustee and the Lenders, the proposal proceedings are untenable. Further, the Nygård Group has no plan to continue to fund its operations and no other lender has stepped up to provide the necessary financing to pay out the Lenders.

[21] The closure of the retail stores, distribution centres and website without consulting the Lenders and the proposal trustee is a serious concern that directly affects the ability of the Nygård Group to continue to operate and for the applicant to realize on the Collateral.

[22] I agree with the applicant that the Nygård Group has provided no information to the Lenders about:

- a) What has happened to the employees and specifically how they have been dealt with;
- b) How the retail stores are being secured and locked down;
- c) How the inventory located in the stores is being dealt with, if at all;
- d) What is happening with the Nygård Group wholesale customers; or
- e) How the Nygård Group is planning to sell its inventory other than the reference to the Perry Ellis potential offer.

[23] It is fundamental for the proposal process to continue that the Nygård Group cooperate with the proposal trustee and that the proposal trustee be in a position to state specifically that the parties subject to the proposal proceeding have been acting in good faith and with due diligence. As noted above, that has not occurred.

[24] In addition to the foregoing, the Nygård Group has failed to comply with orders made by this court and undertakings given by their counsel. Specifically, and contrary to their counsel's representations in court on March 12, 2020, the Nygård Group has failed to return the payroll funds to the Nygård Group's bank account and repay the applicant the payroll advance. The explanation provided in the affidavit of Mr. Fenske affirmed March 18, 2020 is inconsistent with what the court was advised on March 12, 2020.

[25] The Nygård Group was directed pursuant to orders made by the court on March 12 and 13, 2020, to continue to comply with the Credit Agreement. The unilateral closing of its retail stores, distribution centres and website without consulting with the Lenders or the proposal trustee is in breach of the Credit Agreement and the court order. I also find that it is a material adverse change to the creditors which placed the proposal trustee in the position of not being able to comply with its duties under the **BIA**.

[26] I agree with the applicant that in light of the events that have occurred since March 12, 2020, the appointment of Richter was urgently required and Richter was appointed as receiver effective March 18, 2020.

[27] Richter is in the best position to assess the reasonableness of the offers to purchase the real estate and make a motion to court with evidence seeking approval. The evidence filed by the Nygård Group is insufficient to assess the reasonableness of the sale of the Toronto Property and the real estate located in Winnipeg. The proposal trustee stated at para. 15 of the second report that it is not in a position to advise the court or stakeholders that the offer respecting the Toronto Property is fair and reasonable.

[28] The events that occurred since orders were made on March 12 and 13, 2020, are material developments that have caused or had the potential to cause a material prejudice to the Lenders and to the Nygård Group's business, creditors and stakeholders.

[29] The adjournment of the receivership application on March 13, 2020 and allowing the proposal proceedings to continue with the oversight of the proposal trustee was not granting the Nygård Group a licence to operate with impunity. The court's decision on March 13, 2020, was to allow the respondents a limited period of time to make good faith efforts to repay the debt owing to the Lenders and to fully cooperate with the proposal trustee.

[30] I am satisfied that the appropriate course of action is to lift the stay of proceedings that was granted pursuant to s. 69(1) of the **BIA**. The court has jurisdiction pursuant to s. 69.4 of the **BIA** to lift the stay in circumstances in which the court is satisfied:

69.4

. . .

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

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

[31] In my view, both of these requirements have been satisfied in this case. I agree that the Lenders will suffer a material prejudice if the receivership is not granted. While I accept that the shutdown of the retail operations may have been appropriate and necessitated by the COVID-19 virus, the closure of the business, distribution centres and website, without any consultation with the Lenders and the proposal trustee is prejudicial. The proposal trustee and the Lenders require the ability to oversee the preservation of

the Collateral including the inventory and to maintain continuity with employees. The notice sent out by the Nygård Group was inappropriate, referring to unrelated matters and alleging misrepresentations regarding the actions of the Lenders. Regrettably, the notice sent to employees and customers did not achieve certainty regarding the Nygård Group business operations at this difficult time during the COVID-19 pandemic. Instead, it blamed others for the financial difficulties and caused greater uncertainty and instability in the Nygård Group business operations.

[32] Acting in good faith and with due diligence is required for a debtor to remain in possession and to seek the protection of the **BIA** under the proposal process. The lack of good faith by the Nygård Group together with its failure to comply with the previous court orders, satisfies me that the stay must be lifted and the receiver must be appointed to take control of the respondents' business and provide experienced and effective oversight. This is not only in the interests of the Lenders, but it is in the interests of all stakeholders.

[33] While the court has the authority pursuant to s. 50.4(11) of the **BIA** to terminate the 30-day period on the basis that the criteria set forth in that sub-section has been met, I agree that terminating the 30-day period is not what is required at this time.

[34] Once Richter takes control of the assets and the business, Richter will be able to assess the respondents' business and make a recommendation to the court and the other stakeholders. The applicant requested that the court order the proposal proceedings commenced by the NOIs be stayed until further order of the court. That order was granted on March 18, 2020.

[35] A similar approach was taken by the Ontario Superior court in ***Dondeb Inc. (Re)***, 2012 ONSC 6087, [2012] O.J. No. 5853 and, in my view, that approach is equally applicable in this case.

Conclusion

[36] The court grants a stay of the proposal proceedings commenced by the NOIs until further order of the court. The court also grants a receivership order appointing Richter as the receiver in accordance with a draft order that was reviewed in court on March 18, 2020.

[37] Richter will be funded by the Lenders in accordance with the term sheet attached as Schedule B to the receivership order and will be subject to the oversight and jurisdiction of this court.

_____ J.