

*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC  
INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT  
SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM  
COMMERCE LABS INC., INITIUM TRADING AND SOURCING  
CORP., SEARS FLOOR COVERING CENTRES INC., 173470  
CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC.,  
10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041  
ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC.,  
AND 3339611 CANADA INC.

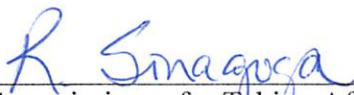
APPLICANTS

**AFFIDAVIT OF RENYA FEENEY  
SWORN SEPTEMBER 19, 2018**

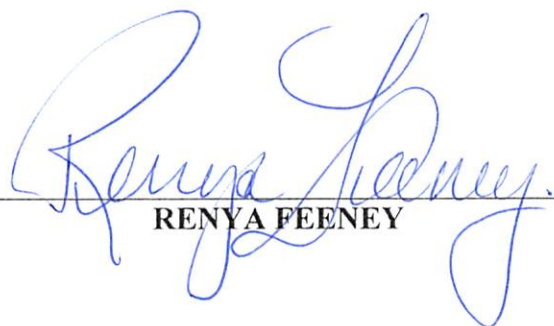
I, Renya Feeney, of the City of Toronto, MAKE OATH AND SAY:

1. I am an Assistant with the law firm of Gardiner Roberts LLP, and as such have knowledge of the following matters below which I verily believe to be true.
2. Attached as Exhibit "A" is a copy of an email dated Sept. 19 2018 sent by Christopher Besant, a partner of the firm, in his capacity as counsel to Things Engraved Inc., to Virginie Gauthier (counsel to the Monitor).

**SWORN BEFORE ME** at the City of  
Toronto, in the Province of Ontario on  
September 19, 2018

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as may be)

Rita Sinagoga, a Commissioner, etc.,  
Province of Ontario, for  
Gardiner Roberts LLP, Lawyers.  
Expires March 3, 2020.

  
\_\_\_\_\_  
**RENYA FEENEY**

RCP-E 16B (May 1, 2016)

This is Exhibit "A" referred to  
in the Affidavit of RENYA FEENEY  
sworn before me on  
the 19<sup>th</sup> day of September, 2018.

  
A Commissioner, etc.

Rita Sinagoga, a Commissioner, etc.,  
Province of Ontario, for  
Gardiner Roberts LLP, Lawyers.  
Expires March 3, 2020.

## Feeney, Renya

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**From:** Besant, Chris  
**Sent:** September 19, 2018 12:25 PM  
**To:** Gauthier, Virginie  
**Subject:** Sears CCAA - TEI Non Material Trust Claim Asserted in the Claims Process  
**Attachments:** Signed - Things Engraved Inc (TEI) - Proof of Claim Form-f - Updated.pdf; TEI Sch A - Proof of Claim Summary-ff.docx; Notice of Revision or Disallowance - Things Engraved Inc.pdf; Notice of Dispute - TEI - 0825-f.docx; TEI NOD Sched A - f.docx

Dear Virginie

I am writing on behalf of Things Engraved Inc. ("TEI") which has filed a Proof of Claim and then a Notice of Dispute in response to the partial NORD it received. I am writing to confirm that there is no need for TEI to participate in the deemed trust proceeding (to do so would both be duplicative and uneconomic).

In its Proof of Claim ("POC") and Notice of Dispute, in addition to its unsecured claims, it asserts a small trust claim (\$315,421.08) no bigger than a rounding error on the Sears Canada Inc. ("SCI") estate and which will have no measurable impact on the distribution of any creditor. The Proof of Claim form and the Schedule A narrative thereto as filed, the NORD, and the Notice of Dispute form and Schedule A narrative thereto, all as filed, are attached. The TEI claim and dispute were filed in accordance with the December 8, 2017 Claims Process Order and are subject to determination in that process. (The supporting documentation to the POC and NOD as noted in the POC and NOD is confidential, and has been filed in the claims process subject to that caveat)

The 25<sup>th</sup> Monitor's Report advises that the Monitor is opposing the Pensioners Deemed Trust motion, as amongst other reasons, it is infeasible for small creditors to participate in that matter, which is the case for my client as well. Unless TEI's trust claim succeeds, paragraphs 37 and 38 of the 25<sup>th</sup> Monitor's report project a realization of only 0-8% on its claims to the extent allowed, and hence it is not economically feasible to participate in the deemed trust proceeding. Even were it to succeed, the economics of participation are little less daunting.

As we understand matters, our clients claim is being determined in accordance with the Dec 8 2017 Claims Process Order, and to the extent its trust claim is successful, those assets would fall outside the SCI estate and hence outside the scope of the deemed pension trust being asserted over the assets of the SCI estate. If it is unsuccessful the assets would fall within the estate, and would be subject to the deemed pension trust if successful. Hence our understanding is that TEI does not need to participate in the deemed trust proceeding as it is not inconsistent, and its merits will be addressed in the Claims Process.

Paragraph 36 of the Monitor's Report states that:

"There are no material secured claims against Sears Canada, with the exception of any amounts that are secured by the court-ordered charges granted in the Initial Order and certain construction lien claims."

I am assuming that my client's unresolved trust claim is deemed not to be material. (If the trust claim were fully successful, it would make a difference in outcome to the thousands of pensioners of less than a few dollars per pensioner. In other words, the TEI trust claim is not material to the estate and its creditors (but it is material to TEI as a modest mid-market Ontario company). If that is incorrect, please let me know.

Based on the foregoing, there is no reason for TEI to participate in the deemed trust process. The TEI trust claim once determined defines the scope of the SCI estate to which the Pensioners deemed trust (and any other general trust claim) would attach - i.e. if successful there would simply be a non-material reduction in the size of the estate to which those claims would attach, and if not, there would be no impact at all.

This approach has practical appeal as well. It would not be productive to burden the deemed trust litigation and its participants with the picayune details of a non material claim. Similarly, it would be financially infeasible for TEI as a small creditor to participate in the complex deemed trust litigation.

I anticipate the Pensioners and any other general trust claimants if any would not oppose that position, and would be content that the Monitor contest on behalf of the creditors or resolve the TEI deemed trust claim through the Claims Process (but of course if particular creditors have a right to participate in the TEI claims determination and wish to participate, this is not intended to restrict their right to do so).

Please note that TEI has no position on tomorrow's motions and will not be attending. This email pertains solely to the deemed trust process which has a separate schedule leading to a hearing date in November, and to TEI's own claim in the Claims Process.

With regards

Chris Besant



**GARDINER  
ROBERTS**

**Chris Besant • Partner**

Gardiner Roberts LLP

Bay Adelaide Centre - East Tower, 22 Adelaide St W, Ste. 3600, Toronto, ON M5H 4E3

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[www.grllp.com/p/christopherbesant](http://www.grllp.com/p/christopherbesant)

*Named one of Ontario's Top 10 Regional Firms by Canadian Lawyer Magazine in 2017-2018*



**GARDINER  
ROBERTS**

**Chris Besant • Partner**

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**PROOF OF CLAIM FORM  
FOR CLAIMS AGAINST THE SEARS CANADA ENTITIES<sup>1</sup>**

Note: Claimants are strongly encouraged to complete and submit their Proof of Claim on the Monitor's online claims submission portal which can be found at [cfcanada.fticonsulting.com/searscanada](http://cfcanada.fticonsulting.com/searscanada).

**1 NAME OF SEARS CANADA ENTITY OR ENTITIES (THE "DEBTOR(S)") THE CLAIM IS BEING MADE AGAINST:**

Debtor(s): Sears Canada Inc.

**2 (A) PARTICULARS OF CLAIMANT**

Full Legal Name of Claimant: Things Engraved Inc.

Full Mailing Address of Claimant: 61 McBrine Place

PO Box 9024

Kitchener, ON

N2G 4X2

Telephone Number of Claimant: 519-748-2211 x2216

Facsimile Number of Claimant: 519-748-2808

E-mail Address of Claimant: rstorms@thingsengraved.ca

Attention (Contact Person): Rob Storms

<sup>1</sup> The "Sears Canada Entities" are Sears Canada Inc., Corbeil Électrique Inc., S.L.H. Transport Inc., The Cut Inc., Sears Contact Services Inc., Initium Logistics Services Inc., Initium Commerce Labs Inc., Initium Trading and Sourcing Corp., Sears Floor Covering Centres Inc., 173470 Canada Inc., 2497089 Ontario Inc., 6988741 Canada Inc., 10011711 Canada Inc., 1592580 Ontario Limited, 955041 Alberta Ltd., 4201531 Canada Inc., 168886 Canada Inc., 3339611 Canada Inc., and SearsConnect.

**(B) PARTICULARS OF ORIGINAL CLAIMANT FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE**

- (i) Has the Claimant acquired this Claim by assignment? Yes  No
- (ii) If yes, attach documents evidencing assignment and provide full particulars of the original Claimant from whom the Claim was acquired from:

Full Legal Name of original Claimant: \_\_\_\_\_

Full Mailing Address of original Claimant: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone Number of original Claimant: \_\_\_\_\_

Facsimile Number of original Claimant: \_\_\_\_\_

E-mail Address of original Claimant: \_\_\_\_\_

Attention (Contact Person): \_\_\_\_\_

**3 AMOUNT AND TYPE OF CLAIM**

The Debtor was and still is indebted to the Claimant as follows:

Currency:	Amount of <u>Pre-Filing</u> Claim (including interest up to and including June 22, 2017) <sup>2</sup> :	Whether Claim is Secured:	Value of Security Held, if any <sup>3</sup> :
<u>CAD</u>	<u>\$270,421.08 (See Sched A)</u>	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	<u>See Sched A</u>
_____	_____	Yes <input type="checkbox"/> No <input type="checkbox"/>	_____
_____	_____	Yes <input type="checkbox"/> No <input type="checkbox"/>	_____

<sup>2</sup> Interest accruing from the Filing Date (June 22, 2017) shall not be included in any Claim.

<sup>3</sup> If the Claim is secured, provide full particulars of the security, including the date on which the security was given, the value for which you ascribe to the assets charged by your security, the basis for such valuation and attach a copy of the security documents evidencing the security. This information may be provided in a separate schedule, if necessary.

Currency:	Amount of <u>Restructuring Period</u> Claim:	Whether Claim is Secured:	Value of Security Held, if any:
<u>CAD</u>	<u>\$845,051.66 (See Sched A)</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	_____
_____	_____	Yes <input type="checkbox"/> No <input type="checkbox"/>	_____
_____	_____	Yes <input type="checkbox"/> No <input type="checkbox"/>	_____

Currency:	Amount of <u>Post-Filing</u> Claim:	Whether Claim is Secured:	Value of Security Held, if any:
<u>CAD</u>	<u>\$230,201.95 (See Sched A)</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	_____
_____	_____	Yes <input type="checkbox"/> No <input type="checkbox"/>	_____
_____	_____	Yes <input type="checkbox"/> No <input type="checkbox"/>	_____

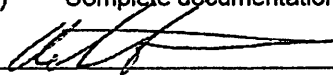
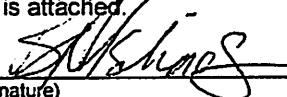
**4 DOCUMENTATION**

Provide all particulars of the Claim and supporting documentation, including amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the Claim, including any claims assignment/transfer agreement or similar document, if applicable, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the affected Debtor to the Claimant and estimated value of such security.

**5 CERTIFICATION**

I hereby certify that:

- (a) I am the Claimant or authorized representative of the Claimant.
- (b) I have knowledge of all the circumstances connected with this Claim.
- (c) The Claimant asserts this Claim against the Debtor(s) as set out above.
- (d) Complete documentation in support of this Claim is attached.

Signature:       Witness:   
Name: Rob Storms      (signature)  
Title: MIS Manager      Barbara Atsalinos  
(print)

Dated at Kitchener this 2 day of March, 2018.

## 6 FILING OF CLAIM AND APPLICABLE DEADLINES

For Pre-Filing Claims (except Pre-Filing Claims that may be asserted by a Landlord), this Proof of Claim must be returned to and received by the Monitor by 5:00 p.m. (Toronto time) on March 2, 2018 (the "General Creditor Claims Bar Date").

For Restructuring Period Claims (except Restructuring Period Claims that may be asserted by a Landlord), this Proof of Claim must be returned to and received by the Monitor by 5:00 p.m. (Toronto time) on the later of (i) the date that is 45 days after the date on which the Monitor sends a General Creditor Claims Package with respect to a Restructuring Period Claim and (ii) the General Creditor Claims Bar Date (the "General Creditor Restructuring Period Claims Bar Date").

For Post-Filing Claims (except Post-Filing Claims that may be asserted by a Landlord), this Proof of Claim must be returned to and received by the Monitor by 5:00 p.m. (Toronto time) on April 2, 2018 (the "General Creditor Post-Filing Claims Bar Date").

For Landlord Claims (including, for greater certainty, any Pre-Filing Claim, Post-Filing Claim or Restructuring Period Claim of a Landlord), this Proof of Claim must be returned to and received by the Monitor by 5:00 p.m. (Toronto time) on the later of (i) the date that is 45 days after the date on which the Monitor sends a General Creditor Claims Package with respect to a Landlord Claim and (ii) April 2, 2018 (the "Landlord Claims Bar Date").

In each case, completed forms must be delivered to the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email at the following address:

FTI Consulting Canada Inc., Sears Canada Monitor  
TD Waterhouse Tower  
79 Wellington Street West  
Suite 2010, P.O. Box 104  
Toronto, Ontario M5K 1G8

Attention: Sears Canada Claims Process

Fax No.: 416-649-8101

Email: [searscanada@fticonsulting.com](mailto:searscanada@fticonsulting.com)

Alternatively, Claimants can, and in fact are strongly encouraged to, complete and submit their Proof of Claim on the Monitor's online claims submission portal which can be found at [cfcanada.fticonsulting.com/searscanada](http://cfcanada.fticonsulting.com/searscanada).

**Failure to file your Proof of Claim so that it is actually received by the Monitor on or before 5:00 p.m. (Toronto time) on the General Creditor Claims Bar Date, the General Creditor Restructuring Period Claims Bar Date, the General Creditor Post-Filing Claims Bar Date or the Landlord Claims Bar Date, as applicable, WILL result in your Claim being forever barred and you will be prevented from making or enforcing your Claim against the Sears Canada Entities. In addition, you shall not be entitled to further notice of and shall not be entitled to participate as a creditor in the Sears Canada Entities' CCAA proceedings.**



## **SCHEDULE A – TEI PROOF OF CLAIM SUMMARY**

1. Things Engraved Inc. (“TEI”) has the following claims:
  - a. a Pre filing Claim, for which trust and equitable priority is asserted;
  - b. a Post Filing Claim;
  - c. a Restructuring Claim;

### **BACKGROUND TO CLAIM**

#### **TEI-SCI Agreement**

2. TEI had a concessions contract with Sears Canada Inc. (“SCI”) as follows:
  - a. Trademark License Agreement dated March 5, 2007 between Sears Canada Inc., Sears, Roebuck and Co., and Minit Canada Ltd. with a term which expired on March 4, 2010
  - b. This agreement was extended by verbal agreement from March 5 2010 to March 25, 2014, as acknowledged in the 2014 Amending Agreement below;
  - c. Amending Agreement dated March 25, 2014 between Sears Canada Inc. (SCI) and Things Engraved Inc. extending the term from March 25 2014 to March 25, 2015 (“2014 Amending Agreement”), which agreement also acknowledged the migration of the rights as Licensee under the Agreement to TEI;
  - d. Letter Agreement dated April 16, 2015 between Sears Canada Inc. and Things Engraved Inc. extending the term from March 25, 2015 to March 25, 2016 (“2015 Amending Agreement”)
  - e. The contract was further renewed by conduct of the parties for annual periods from March 25, 2016 to March 25, 2017 (“2016-2017 Renewal”) and March 25, 2017 to March 25, 2018. (“2016-2017 Renewal”)

(collectively and as assigned, amended, renewed, extended, restated, modified and/or supplemented from time to time, together with all other agreements and instruments, whether written or oral, the “Agreement”)

#### **Locations**

3. By 2017, TEI had 12 concession locations associated with SCI stores as follows:

#	Location ID
1	0934 - Sears, Pen Centre
2	0883 - Sears, Lansdowne Place
3	0777 - Sears, Pickering Town Centre
4	0878 - Sears, Polo Park
5	0858 - Sears, Midtown Plaza
6	0780 - Sears, Park Place Shop. Ctr.
7	0845 - Sears, Medicine Hat Mall
8	0787 - Sears, Truro Mall
9	0910 - Sears, Regent Mall
10	0676 - Sears, McAllister Place
11	0895 - Sears, Hillside Centre
12	0749 - Sears, Metropolis at Metrotown

**Disclaimer**

4. Notice of Disclaimer of the contract was given by SCI under s 32 of the CCAA on November 1, 2017 with an effective termination date of December 1, 2017, terminating the final four months of the contract term.

**TEI's PRE FILING and TRUST/PROPERTY CLAIM**

5. Under the Agreement, TEI was a concessionaire at 12 SCI locations as of the CCAA Filing Date . Under the Agreement, TEI owned its own inventory and the sales proceeds. SCI operated a point of sale system for TEI's benefit under the Agreement, by which it collected TEI's sales proceeds, maintained a separate account re same for TEI , deducted a 15% SCI commission and then remitted the balance to TEI monthly.

6. In the 3 months prior to the CCAA Filing Date, SCI began to wrong fully withhold those remittances. By the CCAA Filing Date, the sum of \$270,421.08 of TEI money (i.e. net of the 15% SCI commission on such sales under the contract ) had been collected by SCI in respect of April May and June 1-21, 2017, and was being wrongfully detained by SCI in the lead up to filing instead of remitted in the normal course as required and was the past practice. Those funds and their proceeds were not and are not assets of SCI. The funds and their proceeds belong to TEI. SCI has not yet accounted for same.

7. These facts give rise to a legally enforceable trust and equitable claim in favour of TEI over those funds, their proceeds and the assets of SCI. Assets subject to those rights are not property or assets of SCI and are assets and property which belong to TEI in equity. As such TEI's claim in this regard ranks in priority to all other claimants ("TEI's Trust Claim"). TEI's Trust claim is in the amount of \$270,421.08 plus to the extent permitted by law applicable interest costs and expenses incurred in connection with their non-payment, which additional amount is estimated to be \$45,000.

**TEI's POST FILING CLAIM**

8. From the Filing Date until early August 2017, TEI continued to operate and generated cash collected through the SCI POS system. The sum of \$230,201.95 was remitted by SCI to TEI in respect of that period as follows particulars of which are in SCI's records as the payee:

Things Engraved Inc.							
SCI Remittances							
<u>Received</u>	<u>Total</u>	<u>Made Up Of</u>					
14-Jul	102,091.80	31,833.90	Processing Date July 10, payment for July 2 - July 8				
		70,257.90	June 22 - July 1				
		102,091.80					
24-Jul	30,546.28	30,546.28	Processing Date July 17, payment for July 9 - July 15				
31-Jul	31,130.90	31,130.90	Processing Date July 24, payment for July 16 - July 22				
08-Aug	44,795.43	44,795.43	Processing Date Aug 1, month end report for July, includes week of July 23 - July 30				
11-Aug	20,055.90	20,055.90	Processing Date Aug 7, payment for July 30 - Aug 6				
05-Sep	1,581.64	1,581.64	Processing Date Aug 29, moth end report for August				
<b>Total</b>	<b>\$230,201.95</b>						

9. The Agreement attributes payments to the account between SCI and TEI. TEI further retained the right of appropriation with respect to payments received under the contract. The CCAA further confers on TEI a right of Set off.

10. If the TEI's Trust Claim is not recognized in full as asserted, TEI reserves the right to assert as a Post Filing Claim, that the contract operated to allocate those payments to correspondingly reduce the Pre Filing Claim (and the right to the extent permitted by the CCAA exercise its right to appropriate the payments in that manner and to set off rights which effect the same result) with the effect that it would have:

- a. a Post-Filing Claim of , plus interest and costs estimated to be \$45,000;
- b. a reduced Pre-Filing Claim of \$270,421.08 - \$230,201.95 = \$40,219.13 plus interest costs and expenses estimated to be \$45,000.

11. The right to appropriate, and/or set-off and/or assert that the contract had that effect with respect any other payments or collections to the pre filing entitlement is similarly reserved.

**TEI's RESTRUCTURING CLAIM**

12. The term of the contract was to continue until March 25, 2018. A Notice of Disclaimer was unilaterally delivered by SCI on November 1, 2017, with effect on December 1, 2017. As a result TEI has a right to assert a damages claim pursuant to s 32 of the CCAA.

13. The amount of that claim is the lost revenue from December 1 2017 to March 25, 2018 (the "Lost Portion of the Term"), which is calculated as follows.

14. the remittances for the similar period from Dec 1 2016 to March 25, 2017 are representative of the sales that would have been earned. The details of those remittances by SCI to TEI are in SCI's records and are as follows:

SCI Remittance	Amount	Date deposited in bank
mid December 2016 remittance	155,133.73	29-Dec-16
end of December 2016 remittance	337,079.47	27-Jan-17
mid-January 2017 remittance	44,661.01	31-Jan-17
end of January 2017 remittance	56,797.55	14-Feb-17
mid February 2017 remittance	53,310.08	28-Feb-17
end of February 2017 remittance	59,598.86	14-Mar-17
mid-March 2017 remittance	45,534.52	28-Mar-17
end of March 2017 remittance	92,936.44	18-Apr-17
<b>TOTAL</b>	<b>\$845,051.66</b>	

15. Based on the contract payments from Dec 1 2016 to March 25, 2017 which totalled \$845,051.66, which are representative of likely store performance in the Lost Portion of the Term, the contract payments that would have been received by TEI Dec 1, 2017 to March 25, 2018 total \$845,051.66 plus interest costs and expenses in connection with same estimated to be \$45,000. Accordingly TEI asserts a Restructuring Claim for that amount.

16. In the alternative, the 2017 annual per store profit for its 12 SCI associated stores totalled \$468,690 and 33% of that figure, or \$156,023 is representative of what would have been earned as profit from the 12 disclaimed stores in the 4 month period from Dec 1, 2017 to March 25, 2018. Accordingly that amount plus interest costs and expenses estimated at \$45,000 is claimed in the alternative as a Restructuring Claim.

#	LocationID	Sales (000s)	GrossCont'n (000s)	Shop Profit Cont'n (000s)
1	0934-Sears, PenCentre	159	117.3	18.27
2	0883-Sears, LansdownePlace	156.8	116.5	12.88
3	0777-Sears, PickeringTownCentre	180.9	135.2	28.33
4	0878-Sears, PoloPark	356	268.3	112
5	0858-Sears, MidtownPlaza	247.9	187.7	56.9
6	0780-Sears, ParkPlaceShop.Ctr.	178.2	136.2	21.96
7	0845-Sears, MedicineHatMall	190.7	144.2	25.04
8	0787-Sears, TruroMall	142.2	108.3	17.38
9	0910-Sears, RegentMall	223.2	169.1	63.35
10	0676-Sears, McAllisterPlace	232.2	174.8	61.8
11	0895-Sears, HillsideCentre	162.6	124.8	26.4
12	0749-Sears, MetropolisatMetrotown	192.7	139	24.38
		2422.4	1821.4	468.69

17. Sears Roebuck & Co was an original party to the Contract. It was not notified of the contract disclaimer by SCI. TEI reserves rights in respect of that fact and in respect of all claims it may have against Sears Roebuck & Co.

18. TEI hereby reserves the right to amend, revise, supplement and/or submit additional documentation in support of this claim.

**Contact Information re the TEI Proof of Claim**

19. Any communications or inquiries concerning this claim should be sent to TEI at the details indicated below, with a copy to counsel to TEI at the address indicated below:

<p><b>TEI CONTACT INFO</b>  <b>Rob Storms</b>  MIS Manager  Things Engraved Inc.  (519) 748-2211 x2216  (519) 748-2808 (Fax)  <a href="http://www.thingsengraved.ca/">http://www.thingsengraved.ca/</a></p>	<p><b>TEI COUNSEL CONTACT INFO</b>  <b>Chris Besant</b>  Gardiner Roberts LLP  Bay Adelaide Centre - East Tower,  22 Adelaide St W, Ste. 3600, Toronto, ON M5H 4E3  T 416.865.4022   F 416.865.6636  e <a href="mailto:cbesant@grllp.com">cbesant@grllp.com</a></p>
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## **Documentation Submitted in Support of Claim**

### **I. TEI-SCI Written Contracts (single PDF)**

- a. Trademark License Agreement dated March 5, 2007 between Sears Canada Inc., Sears, Roebuck and Co., and Minit Canada Ltd. with a term which expired on March 4, 2010
- b. Amending Agreement dated March 25, 2014 between Sears Canada Inc. (SCI) and Things Engraved Inc. extending the term from March 25 2014 to March 25, 2015 (“2014 Amending Agreement”), which agreement also acknowledged the migration of the rights as Licensee under the Agreement to TEI;
- c. Letter Agreement dated April 16, 2015 between Sears Canada Inc. and Things Engraved Inc. extending the term from March 25, 2015 to March 25, 2016 (“2015 Amending Agreement”)

### **II. SCI Notice of Disclaimer Nov 1, 2017 (separate PDF)**

### **III. Documentation re Quantum of Pre and Post Filing Claims and Restructuring Claim**

- a. Pre Filing Claim Amount - calculations documentation:
  - b. Summary of remittance calculation and payment provisions of agreement (word doc entitled Supporting Documentation)
  - b. Excel SpreadSheet Summary of how ledgers used to calculate Pre-Filing Amount
  - c. 8 Ledgers showing sales and remittances from April to July 2017
- d. Post-Filing Claim amount calculations shown above in this Sched A together with extracts from the source ledgers.
- e. Restructuring Claim amount calculations shown above in this Sched A together with extracts from the source ledgers.

## NOTICE OF REVISION OR DISALLOWANCE

### Regarding Claims against the Sears Canada Entities<sup>1</sup> or D&O Claims against the Directors and/or Officers of the Sears Canada Entities

**TO:** Things Engraved Inc (the "Claimant")  
61 McBrine Place  
PO Box 9024  
Kitchener, ON N2G 4X2  
Attn: Rob Storms  
[rstorms@thingsengraved.ca](mailto:rstorms@thingsengraved.ca)

**FROM:** FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of the Sears Canada Entities (the "Monitor")

Capitalized terms used but not defined in this Notice of Revision or Disallowance shall have the meanings ascribed to them in the Order of the Ontario Superior Court of Justice (Commercial List) in the CCAA proceedings of the Sears Canada Entities dated December 8, 2017, the "Claims Procedure Order". You can obtain a copy of the Claims Procedure Order on the Monitor's website at [cfcanada.fticonsulting.com/searscanada](http://cfcanada.fticonsulting.com/searscanada).

Pursuant to the Claims Procedure Order, the Monitor hereby gives you notice that it has reviewed your Proof(s) of Claim or D&O Proof(s) of Claim referenced below and has revised or disallowed all or part of your purported Claim(s). Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be as follows:

Monitor's Claim Reference Number	Currency <sup>2</sup>	As Per Claim Submitted			As Allowed by the Monitor				
		Type of Claim	Debtor(s)	Amount	Type of Claim	Debtor(s)	Secured Amount	Unsecured Amount	Total Amount
6661	CAD	Pre-Filing Claim/Trust Claim	Sears Canada Inc.	\$315,421.08	Pre-Filing Claim	Sears Canada Inc.	\$0	\$270,421.08	\$270,421.08
6663	CAD	Restructuring Period Claim	Sears Canada Inc.	\$890,051.66	Restructuring Period Claim	Sears Canada Inc.	\$0	\$0	\$0
6662	CAD	Post-Filing Claim	Sears Canada Inc.	\$275,201.95	Post-Filing Claim	Sears Canada Inc.	\$0	\$0	\$0

<sup>1</sup> The "Sears Canada Entities" are Sears Canada Inc., Corbeil Électrique Inc., S.L.H. Transport Inc., The Cut Inc., Sears Contact Services Inc., Initium Logistics Services Inc., Initium Commerce Labs Inc., Initium Logistics Services Inc., Initium Commerce Labs Inc., Initium Trading and Sourcing Corp., Sears Floor Covering Centres Inc., 173470 Canada Inc., 2497089 Ontario Inc., 6988741 Canada Inc., 10011711 Canada Inc., 1592580 Ontario Limited, 955041 Alberta Ltd., 4201731 Canada Inc., 168886 Canada Inc. 3339611 Canada Inc. and SearsConnect.

<sup>2</sup> Any claim denominated in a foreign currency has been converted for voting and distribution purposes to Canadian dollars at the Bank of Canada exchange rate in effect at the June 22, 2017 Filing Date. For reference, the exchange rate applied to claims denominated in U.S. dollars is 1.3241 CAD/USD.

## Reasons for Revision or Disallowance:

### *Pre-Filing Claim/Trust Claim*

- 1 Your Pre-Filing Claim of \$270,421.08 for net sales processed through Sears' point of sale system ("POS"), less amounts owing to Sears, in April, May and June 2017 has been allowed as an unsecured claim.
- 2 Your Pre-filing Claim for interest and expenses of \$45,000.00 in relation to the above amount is disallowed as you have failed to provide evidentiary support or other details to substantiate the amounts claimed or the basis for which Sears Canada Inc. ("SCI") would be liable for such costs.
- 3 Your claim on the basis of an express or implied trust in respect of the same net sales amounts is disallowed. Your claim does not satisfy the requirements for such a trust. Amongst other things, the License Agreement dated April 5, 2007, as amended by the Amending Agreement dated March 25, 2014, and as subsequently amended by the Second Amending Agreement dated March 25, 2015, in respect of Sears Personalized Gifts concessions ("Licence Agreement"), does not provide that the net sales processed through Sears' POS will be held in trust for the benefit of the Claimant. Moreover, such funds were not required to be and were not held in a separate account for the benefit of the Claimant.
- 4 Your claim on the basis of a constructive trust is also disallowed. Relevant factors to the disallowance of this claim include:
  - (a) the Monitor is not aware of any evidence indicating any wrongful conduct on the part of Sears that would be relevant to this claim; and
  - (b) the Monitor does not believe any claim of unjust enrichment giving rise to a constructive trust is made out by the Claimant. In particular, the debtor-creditor relationship created by the Licence Agreement, together with the insolvency of Sears, provides a juristic reason for the enrichment and corresponding deprivation in this case.

### *Restructuring Period Claim*

- 5 Your Restructuring Period Claim of \$890,051.66 is composed of:
  - (a) \$845,051.66 for lost revenue from December 1, 2017 to March 25, 2018;
  - (b) \$45,000 for interest and expenses;
- 6 The Restructuring claim is disallowed because the Licence Agreement does not support any such Claims.
- 7 The Licence Agreement expired on March 25, 2016, after which date either Sears or the Claimant could terminate the Licence Agreement on reasonable notice. The claimant received 30 days' notice that the Licence Agreement would be disclaimed as of December 1, 2017. Therefore the Claimant is not entitled to damages for lost profits from December 1, 2017 to March 25, 2018.

- 8 Moreover, pursuant to Article 20.4 of the Licence Agreement, Sears provided the Claimant with the required notice in respect of the termination of the Licence Agreement concurrent with the public notice respecting the closing of the Designated Stores. Therefore, the Claimant is not entitled to recover from Sears any damages incurred as the result of the closing of the Designated Stores.
- 9 Further, Article 21.4 of the Licence Agreement provides that Sears is not liable to the Claimant for payment of any actual, perceived or anticipated loss of revenue or profit due to the termination of the Licence Agreement by either party, for any reason.
- 10 Given that the Restructuring Period Claim for lost revenue has been disallowed, your claim for interest and expenses of \$45,000 in respect of that amount has also been disallowed.

*Post-Filing Amount*

- 11 The Post-Filing Claim for \$275,201.95 is comprised of:
  - (a) \$230,201.95 for money paid to the Claimant post-filing pursuant to the Licence Agreement which you assert can be set-off against the Pre-Filing Claim;
  - (b) \$45,000 for interest and expenses.
- 12 The Post-Filing Claim of \$230,201.95 is disallowed. The Licence Agreement does not provide the Claimant with a right of set-off. Nor does it provide for the re-allocation of funds. It is clear from the terms of the Licence Agreement, the documentation provided by Sears when payments were made, and the proof of claim itself, that all payments made by Sears to the Claimant were strictly for post-filing activity and were not to be allocated to any other period or expense.
- 13 Moreover, a right of "set-off" at common law and/or pursuant to the *Companies Creditor Arrangement Act* requires mutual debts. The post-filing amount is not an amount owing from the Claimant to Sears that the Claimant can set-off against the pre-filing amounts owing to it. Rather, both the post-filing amounts and the pre-filing amounts are debts owing to the Claimant, one of which has been paid. As there is no mutuality of debts, set-off is not available at law.
- 14 Given that the Post-Filing Claim for set-off has been disallowed, your claim for interest and expenses of \$45,000 in respect of that amount has also been disallowed.

As previously noted in the Monitor's Thirteenth Report dated February 18, 2018, the Monitor anticipates that the potential claim recoveries for general creditors of Sears Canada Inc. and its related entities will be in the range of 0% - 10%, depending on the priority treatment of certain claims and realizations on remaining assets. Recoveries for creditors of Corbeil Électrique Inc., SLH Transport Inc., and 168886 Canada Inc. may be outside this range.

**If you intend to dispute this Notice of Revision or Disallowance, you must, by no later than 5:00 p.m. (Toronto time) on the day that is thirty (30) days after this Notice of Revision or Disallowance is deemed to have been received by you (in accordance with paragraph 72 of the Claims Procedure Order), deliver a Notice of Dispute of Revision or Disallowance to the Monitor (by ordinary prepaid mail, registered mail, courier, personal delivery, facsimile**



transmission or email) at the address listed below. Note that where possible, Claimants are strongly encouraged to submit their Notice of Dispute of Revision or Disallowance forms by email.

If you do not dispute this Notice of Revision or Disallowance in the prescribed manner and within the aforesaid time period, this Notice of Revision or Disallowance will be binding on you.

**If you agree with this Notice of Revision or Disallowance**, there is no need to file anything further with the Monitor.

**The address of the Monitor is set out below:**

FTI Consulting Canada Inc., Sears Canada Monitor  
TD South Tower  
79 Wellington Street West  
Suite 2010, P.O. Box 104  
Toronto, Ontario M5K 1G8

Attention: Sears Canada Claims Process

Fax No.: 416-649-8101

Email: [searscanada@fticonsulting.com](mailto:searscanada@fticonsulting.com)

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

You can obtain a Notice of Dispute of Revision or Disallowance on the Monitor's website at <http://cfcanada.fticonsulting.com/searscanada/poc.htm>.

**IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.**

DATED this 27<sup>th</sup> day of July, 2018.

FTI Consulting Canada Inc.

# NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE REGARDING A CLAIM AGAINST THE SEARS CANADA ENTITIES OR THEIR DIRECTOR OR OFFICERS<sup>1</sup>

Capitalized terms used but not defined in this Notice of Dispute of Revision or Disallowance shall have the meanings ascribed to them in the Order of the Ontario Superior Court of Justice (Commercial List) in the CCAA proceedings of the Sears Canada Entities dated December 8, 2017 (the "Claims Procedure Order"). You can obtain a copy of the Claims Procedure Order on the Monitor's website at [cfcanada.fticonsulting.com/searscanada](http://cfcanada.fticonsulting.com/searscanada).

## 1 PARTICULARS OF CLAIMANT

Claim Reference Number:  
*(as indicated in Notice of Revision or Disallowance)* 6661 (Pre Filing), 6662 (Post Filing), 6663 (Restructuring)

Full Legal Name of Claimant: Things Engraved Inc.

Full Mailing Address of Claimant: c/o Gardiner Roberts LLP,  
22 Adelaide St W., Ste 3600  
Toronto ON M5H4E3

Telephone Number of Claimant: 416-854-4022

Facsimile Number of Claimant: 416-865-6636

E-mail Address of Claimant: CBesant@GRLLP.com - with a cc to  
ShawnB@thingsengraved.ca

Attention (Contact Person): Chris Besant

## 2 PARTICULARS OF ORIGINAL CLAIMANT FROM WHOM YOU ACQUIRED THE CLAIM, IF APPLICABLE

- (i) Have you acquired this Claim by Assignment? NO
- (ii) *(If yes, attach documents evidencing assignment)* n/a
- (iii) Full legal name of original Claimant: n/a

<sup>1</sup> The "Sears Canada Entities" are Sears Canada Inc., Corbeil Électrique Inc., S.L.H. Transport Inc., The Cut Inc., Sears Contact Services Inc., Initium Logistics Services Inc., Initium Commerce Labs Inc., Initium Trading and Sourcing Corp., Sears Floor Covering Centres Inc., 173470 Canada Inc., 2497089 Ontario Inc., 6988741 Canada Inc., 10011711 Canada Inc., 1592580 Ontario Limited, 955041 Alberta Ltd., 4201531 Canada Inc., 168886 Canada Inc., 3339611 Canada Inc., and SearsConnect.

### 3 DISPUTE OF REVISION OR DISALLOWANCE OF CLAIM:

The Claimant hereby disagrees with the value of its Claim, as set out in the Notice of Revision or Disallowance dated July 26, 2018, and asserts a Claim as follows:

Type of Claim	Amount allowed by Monitor as unsecured (Notice of Revision or Disallowance)	Amount allowed by Monitor as secured (Notice of Revision or Disallowance)	Amount claimed by Claimant as unsecured	Amount claimed by Claimant as secured
A. Pre-Filing Claim	\$270,421.08	\$NIL	\$	\$315,421.08 (1)
B. Post-Filing Claim	\$NIL	\$--		\$275,201.95 (2)
C. Restructuring Period Claim	\$NIL	\$--	\$890,051.66	\$--
D. D&O Claim in respect of Pre-Filing Period	\$	\$--	\$--	\$--
E. D&O Claim in respect of Restructuring Period	\$--	\$	\$--	\$--
Total Claim	\$270,421.08	\$	\$890,051.66 (3)	\$315,421.08(3)

*(Insert particulars of your Claim per the Notice of Revision or Disallowance, and the value of your Claim as asserted by you).*

Note 1: the Pre Filing Claim is \$270,421.08 plus \$45,000 in expenses/interest. It was asserted as secured on the basis that it is a trust/property claim.

Note 2: The Post-Filing Claim is \$230,201.95 + \$45,000 in expenses/interest. On the POC form, the box checked was unsecured, but the POC contains a note reserving rights to reclassify revise, amend and supplement claims. This was specifically noted in Schedule A to the Proof of Claim and on the face of the Proof of Claim form. The Pre Filing Claim is asserted to be a trust/property claim and is hence a Secured Claim. Claim 2 is a claim made in the alternative to Claim 1 to the extent Claim 1 is not allowed and paid in full as a Trust/Property claim.

Note 3: However classified, the aggregate claim is \$1,205,472.74 (ie \$315,421.08 + \$890,051.66) subject to amendment, revision and supplement as provided and reserved in the original proof of claim and in Schedule A hereto.

### 4 REASONS FOR DISPUTE

*(Provide full particulars of why you dispute the Monitor's revision or disallowance of your Claim as set out in the Notice of Revision or Disallowance, and provide all supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed. The particulars provided must support the value of the Claim as stated by you in item 3, above.)*

See Schedule A hereto and the supporting documentation enumerated therein, which are submitted herewith.



the Claims Procedure Order, a copy of which can be found on the Monitor's website at [cfcanada.fticonsulting.com/searscanada](http://cfcanada.fticonsulting.com/searscanada)). Delivery to the Monitor may be made by ordinary prepaid mail, registered mail, courier, personal delivery, facsimile transmission or email to the address below. Claimants are strongly encouraged to submit their Notice of Dispute of Revision or Disallowance forms by email.

FTI Consulting Canada Inc., Sears Canada Monitor  
TD South Tower  
79 Wellington Street West  
Suite 2010, P.O. Box 104  
Toronto, Ontario M5K 1G8

Attention: Sears Canada Claims Process

Fax No.: 416-649-8101  
Email: [searscanada@fticonsulting.com](mailto:searscanada@fticonsulting.com)

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

**IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, YOUR CLAIM AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.**

## **SCHEDULE A to TEI Notice of Dispute of NORD # 6661, 6662, and 6663**

### **BACKGROUND**

1. Things Engraved Inc. ("TEI") filed a proof of claim against SCI dated March 2, 2018 in the Sears CCAA proceedings (referred to herein variously as "Proof of Claim" or "POC"). The principal amount of the pre - filing claim was admitted as an unsecured claim, but the balance of its claims were rejected and disallowed by Notice of Rejection and Disallowance # dated July 26, 2018 (the "NORD").
2. As detailed in the Proof of Claim, TEI operated its own stand-alone concessions in association with SCI at various malls where Sears Stores were located. Some of the TEI stores were contained inside the Sears store footprints and others were stand-alone kiosks in the malls but not inside the Sears store footprints.
3. Under its concession contract with SCI originally signed in 2007 and renewed orally in 2010 and in writing in 2014 and 2015 and then orally and by conduct thereafter (the "Agreement"), the TEI stores were branded under the name Sears Personalized Gifts, but TEI operated its own business in the kiosks with its own inventory and generated its own cash and credit card collections from daily operations.
4. Pre filing, as an administrative convenience, TEI's collections were processed by SCI through the Sears Point of Sales system and were supposed to be remitted monthly to TEI less a SCI concession fee defined under the agreement. That continued post filing until August 2018, when, once it appeared that SCI was misappropriating the collections, TEI exercised its contract right with SCI consent to switch the collections to its own point of sale system, reserving the right to seek an accounting for the misappropriated funds.
5. Sears arranged for ABL financing in March in the lead up to its CCAA filing with parties affiliated in part with the parties ultimately selected to conduct its liquidation and pledged its credit card receivables in support: see SCI Financials for 2016 section 2.5 which can be found at: [http://www.annualreports.com/HostedData/AnnualReports/PDF/TSX\\_SEARF\\_2016.pdf](http://www.annualreports.com/HostedData/AnnualReports/PDF/TSX_SEARF_2016.pdf)
6. Shortly before the CCAA filing, SCI stopped remitting the payments, a problem that did not become manifest to TEI until the filing.
7. The TEI collections processed through the SCI point of sale system were at all times TEI moneys, not SCI funds and never belonged to SCI or its creditors.
8. The status of the unremitted funds has not yet been disclosed by SCI to date. The funds either still exist in the hands of SCI, or were misappropriated by SCI, either to fund operations or to pay its senior or DIP lenders. If the former, the funds must be turned over to TEI. If the latter, the estate has been unjustly enriched by an equivalent amount, as the senior debt/DIP would have been higher by an equivalent amount, or cash on hand lower by an equivalent amount. Disclosure of the status and fate of the funds is sought in this dispute process.

### **GENERAL**

9. In support of this Notice of Dispute dated August 25, 2018 ("Dispute") of the Disallowance, TEI repeats and relies on the Proof of Claim dated March 2, 2018, including Schedule "A" thereto and the March 2, 2018 zipfile of documents submitted electronically in support thereof.

In addition to this documentation this dispute relies on the further documentation referenced below.

10. TEI's Proof of Claim expressly reserved, and TEI continues to reserve, the right to amend, revise supplement and provide additional materials in support of the its Proof of Claim and the Dispute of the Disallowance.

11. Information tendered in connection with this Dispute and with the POC, including but not limited to the March 2, 2018 zipfile of supporting documentation (SuppDocs) and documentation submitted herewith, is confidential and commercially sensitive. This information is required by SCI's claims, disallowance and dispute processes to be provided for the confidential use of SCI and the Monitor in evaluating the POC and this Dispute of the Disallowance. TEI reserved in the POC and continues to reserve in respect of such documentation and in respect of all documentation submitted in support of this Notice of Dispute, all rights of confidentiality in respect of same and requests and reasonably requires that any public disclosure of same be subject to appropriate redactions and other reasonable protections, which redactions and protections shall be subject to the advance approval of TEI which will not be unreasonably withheld.

#### TEI PROOF OF CLAIM

12. TEI Claims and treatment of those claims under the NORDD is as follows:

Type of Claim	Amount allowed by Monitor as unsecured (Notice of Revision or Disallowance)	Amount allowed by Monitor as secured (Notice of Revision or Disallowance)	Amount claimed by Claimant as unsecured	Amount claimed by Claimant as secured
A. Pre-Filing Claim	\$270,421.08	\$NIL	\$	\$315,421.08 (1)
B. Post-Filing Claim	\$NIL	\$--		\$275,201.95 (2)
C. Restructuring Period Claim	\$NIL	\$--	\$890,051.66 (3)	\$--
Total Claim	\$270,421.08	\$	\$890,051.66 (3)	\$315,421.08(3)

Note 1: the Pre Filing Claim is \$270,421.08 plus \$45,000 in expenses/interest. It was asserted as secured on the basis that it is a trust/property claim.

Note 2: The Post-Filing Claim is \$230,201.95 + \$45,000 in expenses/interest. On the POC form, the box checked was unsecured, but the POC contains a note reserving rights to reclassify revise, amend and supplement claims. This was specifically noted in Schedule A to the Proof of Claim and on the face of the Proof of Claim form. The Pre Filing Claim is asserted to be a trust/property claim and is hence a Secured Claim. Claim 2 is a claim made in the alternative to Claim 1 to the extent Claim 1 is not allowed and paid in full as a Trust/Property claim.

Note 3: However classified, the aggregate claim is \$1,205,472.74 (ie \$315,421.08 + \$890,051.66) subject to amendment, revision and supplement as provided and reserved in the original proof of claim and in Schedule A hereto.

**ADMITTED AMOUNT**

13. The NORD admits the principal amount of the pre filing claim (270,421.08) and rejected the following claims:

- a. Trust Status for Pre Filing Claim of \$270,421.08K+45,000 in expenses/interest)
- b. Post Filing Claim (230,201.95K plus the same 45,000 in expenses/interest) asserted in the partial alternative to the Pre Filing Claim as explained below
- c. Restructuring Claim (845,051.66 plus the same 45,000 in expenses/interest)
- d. The \$45,000 + in expense and interest claims are common to all three claims, and the ground of rejection is the same and hence the response to the rejection of same will be addressed in a separate heading.

The rejection of those claims, and the rejection and/or disallowance of any other claims of TEI is hereby disputed. The grounds of dispute are set out below.

<b>A. Pre-Filing Trust Claim</b>	<b>Amount \$ 270,421.08 + \$45,000+ in Expenses/Interest</b>
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**BACKGROUND TO TRUST CLAIM**

14. TEI's Proof of Claim asserts that its pre filing claim was the subject of a contractual and constructive trust.

15. Specifically, TEI was a concessionaire which operated its own jewellery and engraving operation under a Sears banner in various malls under a contract with Sears. Pursuant to that contract, TEI operated each location, supplied and owned its own inventory, and conducted its own sales. Through the Sears point of sale system in each store, SCI collected the sales proceeds on behalf of TEI, credited same to a TEI account maintained by Sears, took a processing fee from the proceeds, and remitted the balance.

16. Sears was not the vendor but the point of sales transaction processor, funds custodian, and collection and remitting agent. The proceeds of TEI inventory collected was not Sears money. It was TEI money in the hands of Sears.

**NORD POSITION:**

- No trust is created under the TEI contract because the contract did not require the sales proceeds to be segregated.
- The requirements for a constructive trust are not met because there is no wrong full conduct by SCI and no unjust enrichment as there was a juristic reason to appropriate TEI collections to SCI's own account and use.

**TEI POSITION ON CONTRACTUAL TRUST AND PROPERTY ENTITLEMENT*****Trust under Contract***

17. The NORD asserts that the collections do not need to be segregated under the Agreement because there is no duty to segregate the funds. That is incorrect as the agreement recommends throughout that the collections are TEI funds not SCI funds in SCI's hands, and tasks SCI with the role of collector, custodian and remitting agent:

- a. S 7.3(a) of the Agreement specifically requires remittance of the monies collected, not an amount equivalent thereto. 7.3(a)
- b. S 7.2 of the Agreement refers to SCI processing the daily sales and to an account kept by SCI of the Net Sales, from which it takes its commission and remits the balance to TEI.



- c. The Agreement describes SCI function with respect to collections as its local administrative services office in the Stores associated with TEI locations - see Agreement ss. 7.2 and 8.11. In other words, SCI is merely a funds custodian, and a collection and disbursing agent.
- d. The settlement process in 7.3 (a) describes SCI as remitting 80-85% of collection proceeds biweekly (depending on the product or service from which they originate), and then doing a monthly reconciliation and retaining money due to it and remitting the balance. It contemplates the retention and distribution in specie by SCI of the sales proceeds collected.
- e. S 7.2 of the Agreement allows TEI to switch to its own point of sales system and retain the collections and remit a fee to SCI.
- f. The Agreement specifies that TEI is an independent contractor not a franchisor or any closer relationship (Recital and par 24). SCI is in substance just a landlord collection a concession fee as rental for premises and a trademark license and serving as a collections agent-. -- see section 8 – 14.
- g. As noted, pre-termination, SCI had to remit *monies* biweekly and do a final settlement monthly and remit the balance of the *monies* (7.3(a). After termination pursuant to the Agreement by either party, SCI entitled to delay remittance (7.4) . However this clause does not by its terms reference or operate in the event of disclaimer of the agreement under the CCAA. Even if it applied, it allowed SCI to delay remittance post termination for up to 192 days - which expired June 12, 2018. Either way, collections retained by SCI are overdue to be turned over to TEI.
- h. The Agreement shows throughout that TEI is a concessionaire that owns its inventory and sales proceeds and that SCI is just a custodian, collection and disbursing agent.
  - i. The Recitals confirm TEI is operating the business and selling for its own account using a Sears trademark licensed to TEI pursuant to par 3.2
  - ii. Section 1 definitions of “Concession” and “Gross Sales” “Designated Markets” “Designated Stores” refer to sales conducted by Licensee in its own name
  - iii. Definition of Gross Sales defines revenue as in substance in specie revenue in the form of credit card sales, cash cheque money orders debit card sales and the like arising from Licensee’s sales, which under par 7.1 and 7.2 is collected by SCI as collection agent for TEI through the SCI point of Sale system.
  - iv. Section 4.1 refers to the Grant by SCI of TEI of the Concession to operate its own business by procuring and selling its own inventory and services and supervising its own employees: 4.1
  - v. Par 14 confirms that all purchasing of inventory and services for the TEI locations is done by TEI for its own account, not SCI’s. In other words, title to the inventory is in SCI as it the right to sell it and to receive the proceeds thereof after collected by SCI through its POS system.
  - vi. Par 16.2 similarly confirms TEI as vendor is responsibility for collecting sales tax, not SCI.

#### TEI RESPONSE RE UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST Constructive Trust

##### ***Trust under General Law (ie Constructive Trust)***

18. Unjust enrichment requires a benefit to SCI, a corresponding loss to TEI, and no juristic reason for the benefit and loss. SCI clearly benefitted by taking the proceeds of the sale of TEI’s own inventory for its own account, and TEI suffered a corresponding loss. The Inventory and credit card receivables and collections belonged to TEI as explained above. SCI had no juristic reason for misappropriating those funds to its own account. SCI and its estate are clearly unjustly enriched. Constructive Trust is a remedy at law for such unjust enrichment.

19. Constructive Trust is also an independent cause of action. The elements of constructive trust in this case are established: (1) SCI made a commitment under the Agreement to serve as collector custodian and remitter of TEI's sales proceeds; (2) TEI transferred of its property in its sales proceeds to SCI through use of SCI's point of sales system in each store in reliance on that commitment; (3) SCI breached its duties collector custodian and remitter by not remitting same as required and misappropriating the proceeds to its own account. All of the criteria of a constructive trust are met here.

20. The use of the Point of Sale system did not and was not intended to transfer the property in the Collections to SCI. It simply was a way of collecting TEI sales for TEI, which is why the contract also permitted the switch of collection processing to TEI. SCI was not entitled to commingle, use or pledge TEI collection to its lenders. Nowhere in the contract is property in those collections transferred to SCI.

21. SCI improperly failed to remit and kept or used the funds belonging to TEI knowing it was about to file CCAA, and after it filed CCAA, unjustly enriching itself and its insolvency estate with funds and proceeds that never belonged to SCI. Even if the funds were used in operations on the eve of or during its CCAA filing or paid to its lenders, they reduced the secured and DIP borrowing requirement and thereby enhanced by an equivalent amount the net proceeds available to creditors. That increment never belonged to the creditors, and creates a proper basis for application of the doctrine of both Unjust Enrichment and Constructive Trust. This is not a case of a creditor asserting trust to diminish the estate. The trust prevents improper augmentation of the estate through misappropriation of funds that never belonged to SCI in the first place and restores the estate to its proper position.

22. If the funds were not retained in specie by SCI, the liquidation proceeds are an identifiable and connected fund of assets which was artificially augmented by the misappropriated funds and are properly subject to a constructive trust in the amount asserted. The remedy is necessary to avoid unjustly enriching other creditors at TEI's expense.

23. The last audited financial statements of SCI for the 2015 and 2016 fiscal year note that cash is "restricted cash" when it is subject to contingent rights of a third party. (see section 2, Significant Accounting Policies, section 2.7). The Annual reports can be found at: [http://www.annualreports.com/HostedData/AnnualReports/PDF/TSX\\_SEARF\\_2016.pdf](http://www.annualreports.com/HostedData/AnnualReports/PDF/TSX_SEARF_2016.pdf)  
[http://www.annualreports.com/HostedData/AnnualReportArchive/s/TSX\\_SEARF\\_2015.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/s/TSX_SEARF_2015.pdf).  
 In other words, SCI and its creditors were on notice that appropriation of restricted cash for any purpose other than provided by the agreement was wrongful and inconsistent with its own stated accounting policies. Section 2.5 of those same financial statements also notes that in March 2018, SCI pledged its receivables to new lenders, who were on notice that SCI has restricted cash subject to third party rights.

24. Details on the status and fate of the funds is sought in this Dispute proceeding. Rights are reserved to refine this claim once that information is made available.

<b>B. Post-Filing Claim</b>	<b>\$230,201.95 + \$45,000+ in Expenses/Interest</b>
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25. The post filing claim is asserted in the alternative to the pre-filing trust claim. (It is also asserted to be a secured claim on the basis that it is a property/trust claim). Specifically the Post Filing Claim becomes relevant as an alternative claim if:

- a. The pre filing trust status is not allowed and hence the allowed pre filing claim remains an unsecured claim, and either one or more of b, c or d is true:
- b. pre filing claims as a class may receive a greater percentage distribution on the dollar than the pre filing claims, or
- c. a post filing claim has a stronger trust or priority position against other claims than a pre filing claim
- d. the post filing claim to expenses is a stronger claim than the pre filing one.

In those circumstances, the pre filing claim would result in up to approximately \$230,000 of the TEI claim getting pre filing treatment and approximately \$40,000 being treated as a pre filing claim.

26. The expenses in dealing with the post filing claim and related are part of the overall expenses and interest claim hence remain relevant in any event. to the extent the expenses are higher priority or receive a higher percentage distribution, the characterization of the expenses as pre or post filing would be relevant.

#### NORD POSITION RE POST FILING CLAIM

27. The NORD argues that the post filing claim does not exist because TEI has
- no legal or equitable right pre filing versus post filing indebtedness because the set off lacks mutuality, and no contractual right to do so as the contract is silent.
  - no contractual or other right to appropriate post filing payments to pre filing indebtedness.

#### TEI POSITION RE POST FILING CLAIM

28. Section 21 of the CCAA preserves the right of set off both legal and equitable. While legal set off requires mutuality, equitable set off does not.

29. In any event, the set off of debts and claims arising from the same contract is the definition of mutuality even for the purposes of legal set off. Mutuality is not destroyed by the filing of a CCAA proceeding, and hence pre and post filing debts do not lose mutuality by the intervention of a CCAA stay.

30. With respect to the right of appropriation of post filing payments, the Agreement requires SCI in each remittance to remit all amounts due under the Agreement. ie it does not appropriate the payment to the current period. Hence a payment when made to TEI is on account of whatever total amount is due at the time TEI receives that payment. The contract does not further appropriate the payments beyond that, and because the contract has spoken on the matter, SCI cannot pick and choose to which period to allocate payments. The way the contract is worded, that right belongs to TEI as recipient. Hence TEI is entitled to allocate post filing payments to any amount owing under the agreement. Exercising the right of allocation is a post filing step under an un-terminated subsisting ongoing contract which is not subject to the stay.

31. Accordingly TEI continues to reserve the right to allocate the payments to the pre filing period if the post filing claim will be worth more than the pre filing claim. That is not yet known, as the trust status of the pre filing claim has to be determined, and the relative treatment of pre and post filing claims under any plan or distribution is not yet known.

C. Restructuring Period Claim	\$890,051.66 (3)
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## **BACKGROUND TO RESTRUCTURING CLAIM**

32. TEI continuing operating its concessions post CCAA right through to December 1, 2017. In August, it switched to its own Point of Sale system. Discussions over various commercial issues ensued with SCI which did not lead to a conclusion. As a result, on November 1, 2017, SCI issued a Notice of Disclaimer of the Agreement under the CCAA which took effect December 1, 2018.

33. In its Proof of Claim, TEI took the position that it is entitled to the lost contract revenue until the end of the latest contract renewal which expired on March 15, 2018. The net remittances from SCI that would have been earned in that period total \$845,051.66. The calculation of same is based on the equivalent period in the prior year, which is representative of TEI's expectation damages for the lost portion of the contract term resulting from the disclaimer.

### **NORD POSITION**

34. This claim was rejected in the NORD for the following reasons:

- a. SCI asserts a contractual right to downsize out of locations without liability
- b. SCI asserts the Disclaimer Notice is notice of downsizing under the contract.
- c. SCI deny the contract had a 2 year term after the last renewal and assert it could be terminated by SCI upon reasonable notice
- d. SCI claim the contract relieves them of liability for lost future contract revenue).

### **TEI POSITION ON RESTRUCTURING CLAIM**

35. While SCI has a contractual right to downsize under the contract, that is not the right they exercised. Instead they chose for their own commercial reasons to exercise a right to disclaim under the CCAA. Different Right = Different Consequences. When the disclaimer was given, TEI was still operating in some locations and SCI had not exercised any walk away right in those locations. SCI did not use their contractual right to exit those locations, but instead used the disclaimer which is a damages trigger.

36. A disclaimer notice under the CCAA is not the same as exercising a contract right to walk away from a specific store on notice. The contract has a specific provision. SCI chose to use a different remedy under the CCAA which by operation of statute triggers expectation damages (loss of future profits as if the contract was left in place). They presumably chose that alternative route for tactical reasons which they believed benefitted them, and are stuck with the downside of their choice.

37. Respecting the few stores SCI exited pre-disclaimer, there are two issues of contractual compliance: (i) SCI were already in breach of the contract and hence there is an issue about whether they could invoke the exit right; and (ii) SCI did not give notice of the exercise of a walk away right under the contract for those stores. They simply walked away, which arguably does not count as invoking the right, but rather compounds their breach. Basically the walk away right is for a solvent contractually compliant entity, not a liquidating one which is withholding collections.

38. With respect to the length of the remaining term of the contract, TEI asserts the contract term was a rolling one year term which expired March 25, 2018. That is consistent with the documentation and the parties the course of dealing.

39. There was a written agreement with a 3 year term from There is a pattern of conduct of verbally renewing acknowledged in the 2014 renewal document:

- There was a written agreement for a 3 year term which expired in 2010. That agreement contemplated renewals
- The agreement was renewed verbally from March 2010 to March, 2014. That is acknowledge in the written 1 year renewal entered into in March 2014 when TEI changed its name to its current name.
- A further written one year renewal was entered into in March 2015.
- 2015 renewal concludes " we look forward to *another* successful year".
- the parties continued in that manner until the present.

In short TEI asserts there is a pattern of conduct establishing rolling 1 year renewals, the latest of which expired March 15, 2018.

40. SCI claims the contract exempts them from liability for expectation damages for lost revenue or profits or for damages for lost goodwill (see sections 5.1, 20.11c, 21.1e and 21.4). However those clauses only apply to termination rights exercised under the contract. (§ 5.1 is irrelevant as TEI did not claim for loss of goodwill; it claimed loss of net revenue for the term of the contract as expectation damages). SCI chose not to terminate under the contract for their own tactical reasons. They disclaimed under the CCAA. That gives TEI an independent statutory right to expectation damages. SCI's choice; their consequences.

41. Specifically Clause 20 of the Agreement is entitled "Termination". Its specifies the ways in which the contract can be terminated. Clause 21 is entitled "Consequences of Termination" and specifies the consequences from following the section 20 procedures. Clause 20 and 21 have no application to a CCAA Disclaimer. The Act specifies the consequences. If SCI was seeking to use their contract rights, they would have given notice of the exercise of same under the contract, not notice under the CCAA.

<b>D. Expenses incurred in dealing with the breaches</b>	<b>\$45,000.00 +</b>
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#### NORD POSITION

42. The NORD takes the position the expense claims are unsupported and are only valid if the underlying Pre filing post filing and /or restructuring claims are valid.

#### TEI RESPONSE RE EXPENSES

43. TEI agrees that the expense claims hinge on whether any of claims are valid. As TEI asserts those claims are valid, it asserts the expenses claimed are valid claims as well.

44. TEI has incurred legal expenses consequent on SCI breaches of its agreement including as follows:

- dealing with remittance of pre filing collections and related breaches,
- post-CCAA supply issues to ensure damages not aggravated by continuing the relationship
- Aug 2017 point of sale switch and related negotiations with SCI Sept to November

- SCI Disclaimer (Nov –Dec 2017 ),
- monitoring CCAA process re issues relevant to SCI-TEI relationship (entire period)

45. TEI's legal invoices are summarized below for the period June 22, 2017 to March 2, 2018.

Acct #	Period	Fees Billed	HST	Total Acct	Comment
	July 2017	4,225.00	549.25	4774.25	Dealing with breach of Agreement due to non-remittance of pre filing collections and related breaches, post-CCAA supply issues, and monitoring CCAA process re issues relevant to SCI-TEI relationship
	Aug 2017- Jan 2018	15,000.00	1,950.00	16,950.00	point of sale switch and related negotiations with SCI, SCI Disclaimer, and monitoring CCAA process re issues relevant to SCI-TEI relationship
TOTAL		19,225.00	2499.25	<b>\$21,724.25</b>	
Projected additional legal expenses	Feb 2018 Forward				Preparing Proof of Claim, Dealing with NORD, Preparing Dispute of NORD and related services

46. The legal accounts contain some confidential information but can be provided on a confidential basis once reviewed for necessary redactions. Privilege and confidentiality re same is not waived, including without limitation by relying on or submitting same in support of the claim. Privilege and Confidentiality of same is hereby expressly reserved.

47. TEI incurred non legal expenses in connection with Point of Sale Switch to its own systems in August to protect itself from further misappropriations of its proceeds, and from the the shutdown of all of its concessions at once further to the Notice of Disclaimer. Those costs are detailed on the Supporting Document submitted herewith entitled "Sears Costs". They total \$52,555,38 and are properly claimable as consequential damages flowing from the CCAA disclaimer.

48. The ultimate expenses of the dealing with the breaches will exceed the \$45,000 claimed (they already total 21,724.25 + \$52,555,38 and counting. Rights to claim the additional amount and submit additional materials as they become available is reserved.

<b><i>E. Interest on the above claims @ 5%</i></b>	See Below
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#### NORD POSITION

49. No interest was allowed because the claims are all disallowed.

#### TEI RESPONSE RE INTEREST

50. TEI agrees that interest only applies if the claims are valid. However as TEI asserts the claims are valid, it claims Interest at 5% on its claims from the date its cause of action accrued, which is a running total. The interest claim is currently as follows and continues to accrue:

- a. Interest @ 5% is claimed from June 22, 2017 forward on the Pre Filing Claim and related expenses;
- b. Interest @ 5% is claimed from August 1 forward on the Post Filing and related expenses
- c. Interest @ 5% is claimed from December 1, 2018 forward on the Restructuring Claim and related expenses

The ultimate interest claim depends on the allowed amount and the allowed date from which interest runs.

#### PROPOSED PROCEDURE TO DETERMINE DISPUTE

51. TEI requests an oral hearing before the claims officer and the right if it so elects to call evidence on any issues that are not resolve between TEI and SCI before then. TEI Reserves the right to tender further evidence in support of the claim as it is identified. TEI proposes to first discuss with the Monitor and SCI how to resolve issues, narrow the points in dispute as far as possible, and suggestions to help expeditiously and economically determine disputed elements of the claim.

#### ADDITIONAL SUPPORTING DOCUMENT SUBMITTED IN SUPPORT OF DISPUTE

52. TEI relies on the documents originally submitted with the proof of claim plus the additional documents submitted herewith.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC.,  
THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND  
SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711  
CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

Court File No. CV-17-11846-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDING COMMENCED AT  
TORONTO

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RCP-E 4C (May 1, 2016)



IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC.,  
THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND  
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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
  
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RCP-E 4C (May 1, 2016)