Court File No. CV-18-00611219-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the Companies' Creditors Arrangement Act, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, SEARS HOLDINGS CORPORATION, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

# FACTUM OF THE ESL PARTIES

## (Pause Motion Returnable September 19, 2019)

September 16, 2019

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TO: **THE CCAA SERVICE LIST**

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# FACTUM OF THE ESL PARTIES
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## PART I - SUBMISSIONS

1. A pause in the litigation timetable is appropriate to ensure the ESL Parties' substantive rights are not prejudiced. In the absence of a pause, the former directors will not be fully or properly funded, which will impede their ability to adequately prepare for and participate in the upcoming stages of the litigation. This prejudices not only the former directors' right to defend themselves, but also the ESL Parties' defence.

2. Against this clear prejudice to the defendants, there is no evidence of any specific prejudice to the plaintiffs. Rather than consent to a delay in the schedule, the plaintiffs seek to take advantage of a group of unfunded—or underfunded—defendants, at the expense of (1) basic trial fairness and (2) the reasonable expectations of the former directors when they agreed to join the Board of SCI. The plaintiffs' position is both hypocritical and disingenuous: on the one hand, they characterize

the directors as ordinary defendants facing ordinary litigation; on the other hand, they argue that they are special litigants with a right to force compliance with an already aggressive timetable at all costs (despite the lack of prejudice). A pause in the litigation is fair and just in the circumstances.

**The directors' full participation is essential to ensure fairness to the ESL Parties**

3. The common thread of the plaintiffs' cases is an allegation that the former directors breached their duties to Sears Canada Inc. ("**SCI**"):

(a) The Monitor alleges that the dividend was a transfer at undervalue because the directors intended to defraud, defeat or delay SCI's creditors.

(b) The Litigation Trustee alleges that the dividend was procured by collusion, that it was declared in breach of fiduciary duties owed to SCI, and that the payment was oppressive to SCI's creditors.

(c) The Pension Administrator alleges that the dividend was declared in breach of fiduciary duties to SCI and to the pension plan, and that the payment was oppressive to the pension plan.

4. The former directors are the only parties with firsthand knowledge of the conduct leading to the alleged breaches. They are the only parties who can speak directly to the documents and circumstances pertaining to the approval of the 2013 dividend. The former directors are far better positioned than the ESL Parties to address what they knew, what they considered, and what their intentions were when they unanimously voted in favour of the 2013 dividend. As is evident in the pleadings, the ESL Parties' defence is intertwined with these issues, and this information is essential to the proper determination of this litigation.

5. Forcing the former directors to proceed with this case in the absence of insurance coverage puts at risk their ability to fully and properly assert their defence and to share information and resources, where appropriate, with the other defendants.

6. Even in the ordinary commercial case it would be prejudicial and highly irregular for former directors of a corporation to personally fund the litigation, even for a limited period. However, this is an extraordinary case—involving three plaintiffs with virtually unlimited access to funds and a total of four separate claims—that calls out for a level playing field. The Monitor and Litigation Trustee, alone, set aside a reserve of between $9-11 million for their own litigation related fees.[1] The former directors have, to date, incurred fees in excess of $3 million.[2] Self-funding this type of litigation will, no doubt, diminish the former directors' capacity to fully fund and prepare for this litigation, and could not have been within their reasonable contemplation when they agreed to join the Board of SCI.

7. The importance of proper and full funding will become more important as the schedule progresses. This is particularly true for the next step in this litigation—namely, preparing for examinations for discovery—given its considerable anticipated expense. An inadequate or rushed preparation for this crucial step will directly prejudice the ESL Parties' own defence, and will impair the fact-finding and truth-seeking function of these proceedings.

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[1] Transcript of the Cross-examination of Steven Bissell held on September 10, 2019, Q. 52, p. 20, Transcript Brief of the Former Directors, Tab 1, p. 7. The range, $9-11 million reflects the balance in the litigation reserve once the $1-3 million reserve for adverse costs is removed.

[2] There was USD$3 million in funding under the 2015 XLC policy: Reply Affidavit of Donald Campbell Ross sworn September 6, 2019, Exhibit "S", Reply Motion Record of the Former Directors, dated September 6, 2019, Tab 1, p. 97. That coverage is exhausted: Affidavit of Donald Campbell Ross sworn August 26, 2019, Motion Record of the Former Directors, dated August 26, 2019, Tab 2, Ross Affidavit, para. 46, p. 21.

**No prejudice to the plaintiffs**

8. There is no evidence in the record as to any particular prejudice to the plaintiffs beyond the ordinary prejudice associated with litigation delays. Indeed, to the extent that there is a prejudice from the delay in a distribution from SCI's estate, it is clear that the Monitor has the power to minimize that prejudice by making an interim distribution.

9. The plaintiffs insist on zealous adherence to the current timetable despite the prejudice faced by the former directors and the ESL Parties, and despite the fact that there is no evidence that the plaintiffs will suffer any prejudice from the delay. Such a strategic advantage for the plaintiffs would be unjust and this Court should not permit it.

**PART II - ORDER REQUESTED**

10. The ESL Parties support the relief requested by the former directors.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16th day of September, 2019.

per Harry Underwood

Emma Carver

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