

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

**SEARS CANADA INC., SEARS HOLDING CORPORATION,
ESL INVESTMENTS INC., WILLIAM C. CROWLEY,
WILLIAM R. HARKER, DONALD CAMPBELL ROSS,
EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA,
JAMES MCBURNEY and DOUGLAS CAMPBELL**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**REPLY TO THE STATEMENT OF DEFENCE
OF ESL INVESTMENTS INC.**

1. The plaintiff denies all allegations in the Statement of Defence of ESL (the, “**ESL Defence**”) unless expressly admitted herein. The plaintiff repeats and relies upon the allegations in the Fresh as Amended Statement of Claim.
2. Capitalized terms in this Reply have the meaning ascribed to them in the Fresh as Amended Statement of Claim.
3. With respect to the allegations in the ESL Defence that it received no part of the 2013 Dividend, as set out at paragraph 17(b) of the Fresh as Amended Statement of Claim, at the time the 2013 Dividend was issued, ESL was the beneficial owner of 17,725,280 shares in Sears through

its subsidiary entities: ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, and CRK Partners, LLC (collectively, the “**ESL Related Parties**”).

4. ESL, and its principal, Lampert, owned and controlled the ESL Related Parties. ESL, as a beneficial owner of the shares legally owned by the ESL Related Parties, directly or indirectly received the substantial benefit of the proceeds from the 2013 Dividend paid to the ESL Related Parties. As a result, it is a façade and disingenuous for ESL to allege that it did not receive any part of the 2013 Dividend.

5. In any event, whether or not ESL itself directly or indirectly received the benefit of the 2013 Dividend, ESL exercised control over Sears through its ownership and control of the ESL Related Parties and its ownership and control in Holdings, which in turn owned 51% of the outstanding shares in Sears at the time of the 2013 Dividend. This control is confirmed in Sears’ 2013 Annual Report which states:

As of the date hereof, [Holdings] controls approximately 51% of [Sears’] voting power and ESL controls approximately 28% of [Sears’] voting power.... So long as [Holdings] controls a majority of [Sears’] outstanding common shares, [Holdings] will have the ability to control the election of the board of directors and the outcome of certain shareholder votes.

6. As such, ESL is liable for its conduct under the oppression remedy and cannot shield itself behind its labyrinthine and undisclosed web of related holdings.

7. With respect to the allegations in the ESL Defence that the 2013 Dividend did not cause Sears’ insolvency, the defendants’ obligations not to unfairly disregard, unfairly prejudice, or act oppressively against its creditors’ interests, which includes the Hometown Dealers’ interests, exists regardless of whether Sears’ insolvency was immediately foreseen or foreseeable at the time the

2013 Dividend was declared, and regardless of whether the 2013 Dividend caused Sears' insolvency. Such obligations were, however, heightened in the circumstances of this case as the risk of the failure of Sears was foreseeable. Moreover, given Sears' failing business model and slow liquidation of its prime real estate assets, the creditors' (including the Hometown Dealers') interests ought to have increased in relevancy and importance when the Board made decisions.

8. The cause of Sears' eventual insolvency has no bearing on the fact that the creditors' reasonable interests were oppressed, unfairly prejudiced or unfairly disregarded by the 2013 Dividend. There is \$509 million less in the estate of Sears to distribute to Sears' creditors, including the Hometown Dealers, as a result of the defendants' oppressive conduct.

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1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC., et al.
Defendants

Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT MILTON

REPLY

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