

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MORNEAU SHEPELL LTD. in its capacity as administrator of the
Sears Canada Inc. Registered Retirement Plan

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP,
EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY,
DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI,
R. RAJA KHANNA, JAMES MCBURNEY, DOUGLAS CAMPBELL,
and SEARS HOLDINGS CORPORATION

Defendants

**STATEMENT OF DEFENCE OF THE DEFENDANT,
SEARS HOLDINGS CORPORATION**

1. Except as expressly hereinafter pleaded, the Defendant, Sears Holdings Corporation (“SHC”), has no knowledge of the allegations contained in the Amended Statement of Claim.
2. In particular, SHC has no knowledge of the allegations in the Statement of Claim insofar as they relate to ESL Investments, Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP and Edward Lampert (the “**ESL Parties**”), or William Harker, William Crowley, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell (the “**Former Directors**”).

3. If any of the ESL Parties, Former Directors, or anyone else, engaged in any of the conduct alleged in the Amended Statement of Claim, they were not acting on behalf of SHC and such conduct is not attributable to SHC.

4. SHC is a corporation incorporated under the laws of Delaware in the United States. On October 15, 2018, SHC filed for protection under Chapter 11 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York (the “**Chapter 11 Proceedings**”). The Chapter 11 Proceedings are ongoing.

No Knowing Assistance or Knowing Receipt

5. SHC has no knowledge of whether the Former Directors were induced into, or knowingly assisted in, committing any breach of their fiduciary duties. Any inducement or knowing assistance in any breach by the Former Directors of their fiduciary duties is not attributable to SHC.

6. SHC has no knowledge as to whether the declaration and payment of a dividend to the shareholders of Sears Canada Inc. (“**SCI**”) in November and December of 2013 (the “**2013 Dividend**”) constituted a breach of the Former Directors’ fiduciary duties to SCI. If the Former Directors did not breach their fiduciary duties, SHC could not have induced or knowingly assisted in a breach, or received funds arose out of a breach of fiduciary duty.

7. Regardless of whether the Former Directors breached their duties, SHC had no actual or constructive knowledge of any alleged breach or fraudulent or dishonest conduct, nor was SHC willfully blind or reckless as to the existence of an alleged breach or fraudulent or dishonest conduct.

8. Regardless of whether the Former Directors breached their duties, SHC did not receive any portion of the 2013 Dividend for its own use and benefit.

9. SCI paid the 2013 Dividend from its own funds, not funds belonging to or being held in trust on behalf of the Plaintiff or pensioners of SCI. The Plaintiff can sustain no cause of action for knowing assistance or knowing receipt.

No Unjust Enrichment

10. SHC was not unjustly enriched by the payment of the 2013 Dividend. SHC was not enriched at all by the 2013 Dividend, and SHC has no knowledge of any corresponding deprivation to the Plaintiff.

11. If the payment of the 2013 Dividend constituted an enrichment to SHC, which is not admitted, but expressly denied, there was a juristic basis for the receipt and retention of SHC's portion of the 2013 Dividend. SHC was a shareholder of SCI in 2013. The receipt of dividends is a normal incident of the ownership of shares. The declaration and payment of dividends was within the powers of SCI. Once the 2013 Dividend was declared, SHC, as a shareholder of SCI, was entitled to receive its respective proportion of it. Furthermore, if the payment of the 2013 Dividend constituted an enrichment, SHC received any such dividend without actual or constructive notice of any defect in SCI's ability to pay the dividend.

12. SCI paid the 2013 Dividend from its own funds, not funds belonging to or being held in trust on behalf of the Plaintiff or pensioners of SCI. The Plaintiff can sustain no cause of action for unjust enrichment.

No Oppression

13. SHC has no knowledge of whether the declaration and payment of the 2013 Dividend was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of SCI or its creditors.

14. If the declaration and payment of the 2013 Dividend was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of SCI or its creditors:

- (a) SHC is not a proper respondent to an oppression claim, as SHC had no actual or constructive knowledge of whether the 2013 Dividend was oppressive, unfairly prejudicial, or unfairly disregarded the interests of SCI or its creditors;
- (b) Any involvement in the decision to declare the 2013 Dividend is not attributable to SHC; and
- (c) The Plaintiff has no standing to assert a claim for oppression. The Plaintiff is not a complainant within the meaning of Section 241 of the *Canada Business Corporations Act*, RSC, 1985, c C-44, as amended (the “*CBCA*”).

15. There is no entitlement to oppression relief under the *CBCA* as no case for oppression has been made out. The Plaintiff’s alleged expectations are not reasonable.

16. The only reasonable expectation on the part of the Plaintiff was that SCI would fund the Plan according to law. That happened. At the time of the 2013 Dividend, the Plan was funded to the extent legally required. In any event, the funding obligations were exclusively those of SCI, and SHC owes no duties and has no obligations to the Plaintiff in this Action, or those Plan beneficiaries whose interests it represents.

17. The 2013 Dividend did not cause SCI's insolvency, which occurred over three-and-a-half years after the declaration of the 2013 Dividend. SCI's insolvency was not a foreseeable consequence of the declaration and payment of the 2013 Dividend. The 2013 Dividend was not a cause in fact or in law of SCI's inability to satisfy its obligations as and when they became due.

18. Regardless of whether the 2013 Dividend was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of SCI or its Creditors, SHC had no involvement in the decision to declare and pay the 2013 Dividend.

The Action is Time-Barred

19. This Action was commenced on December 19, 2018, and SHC was named as a defendant only on May 23, 2019, more than five years following the declaration of the 2013 Dividend on November 19, 2013. The claims asserted in this Action were discovered or reasonably should have been discovered at the time of the 2013 Dividend. As such, the two year limitation period under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B expired more than three years before the Action was commenced, and the Action is time-barred.

Failure to Mitigate

20. If the Plaintiff has suffered harm for which SHC is obliged to compensate it, which is denied, any damages should be reduced as a result of the Plaintiff's failure to mitigate its alleged damages, in particular:

- (a) the failure to assert a statutory trust over SCI's remaining estate; and

- (b) the failure to implement pension governance and investment approaches that would provide an opportunity to recover the plan members' lost benefits.

Relief Sought

21. SHC asks that this Action be dismissed with costs.

September 16, 2019

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Plaintiff

SEARS HOLDINGS CORPORATION. et al.

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Court File No. CV-18-00611217-00CL

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PROCEEDING COMMENCED AT TORONTO

**STATEMENT OF DEFENCE OF THE DEFENDANT,
SEARS HOLDINGS CORPORATION**

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