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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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*

SUPPLEMENTARY MOTION RECORD (CERTIFICATION)

March 11, 2019

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Defendants

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INDEX

Court File No. 4114/15CP

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED NOTICE OF MOTION (CERTIFICATION)

THE PLAINTIFF will make a motion to the Honourable Justice Thomas McEwen on Wednesday, April 17, 2019 at 10:00 a.m. or as soon after that time as the motion can be heard ~~a date and at a time to be fixed~~, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order certifying this proceeding as a class proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("**CPA**");

2. An order that the class be defined as:

All corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to November 19, 2013 ~~June 22, 2017~~ (the "**class members**")

or such further and other definition as counsel may advise or the Court may determine upon this motion;

3. An order designating the plaintiff as the representative plaintiff;

4. An order that this proceeding be certified on the basis of the following common issues, or such further and other common issues as counsel may advise or the Court may determine upon this motion:

a) Are the class members "complainants" within the meaning of section 238(d) of the *Canada Business Corporations Act*, RSC 1985, c C-44 ("**CBCA**") in respect of the claims made in the action as against the defendants, and each of them?

b) Did the defendants, or any of them, engage in conduct that was "oppressive" to the class members' interests ~~conduct~~ within the meaning of section 241 of the CBCA in respect of the authorization and payment of an extraordinary cash dividend paid on December 6, 2013 (the "**Extraordinary Dividend**")?

c) If so, are those defendants jointly and severally required to pay compensation pursuant to s. 241(3)(j) of the CBCA or otherwise to the class members?

~~d) If so, what is the quantum of such compensation?~~

d) In determining the compensation:

i. Is the quantum of such compensation to be based on the Plaintiff's proven affected unsecured claim against Sears Canada Inc. ("**Sears**") of $80,000,000, as agreed by the court-appointed monitor in the filing by Sears under the *Companies' Creditors Arrangement Act* ("**CCAA**") and as set out in the Plan of Arrangement filed by the monitor in the CCAA ("**CCAA Claim Amount**")?

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ii. If not, directions with respect to the calculation of the quantum of compensation to be determined at a subsequent hearing following the determination of common issues (a), (b) and (c);

5. An order approving the ~~Plan of Proceeding~~ Amended Litigation Plan proposed by the plaintiff;

6. An order that Sears Canada Inc. or its monitor (to the extent it has such information in its possession) provide to class counsel the last known mailing and email addresses of all class members;

7. An order that Notice of Certification to the class be delivered by regular mail or email to the last-known mailing or email addresses, as the case may be, for the class members provided by Sears Canada Inc. or its monitor;

8. An order that the opt-out period run for a period of thirty (30) days from the date on which the Notices are sent by regular mail;

9. Costs of this motion; and

10. Such other order respecting the conduct of this proceeding and its fair and expeditious determination as this Court deems just.

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THE GROUNDS FOR THE MOTION ARE:

1. The fresh as amended statement of claim discloses causes of action against the defendants;

2. There is an identifiable class of approximately 351 corporations which will be represented by the representative plaintiff;

3. The claims of the class members raise common issues;

4. A class proceeding is the preferable procedure for resolving the common issues;

5. The representative plaintiff will fairly and adequately represent the interests of the class members, has a workable plan for advancing the proceeding on behalf of the class members and notifying the class members, and does not have any interest in conflict with the interests of the other class members;

6. *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and in particular sections 5 and 12 thereof;

7. Rules 1, 2 and 12 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and

8. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of James Kay sworn January 18, 2019;

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2. The affidavit of Andy Seretis sworn March 11, 2019;

3. The pleadings and proceedings herein; and

4. Such further and other material as counsel may advise.

DATE: March 11, 2019

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Court File No. 4114/15CP

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF ANDY SERETIS
SWORN MARCH 11, 2019

I, ANDY SERETIS, of the Township of King, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am an associate lawyer with the law firm of Sotos LLP, co-counsel for the Plaintiff, 1291079 Ontario Limited ("**129 Ontario**"). As such, I have personal knowledge of the matters to which I depose herein.

2. Attached as Exhibit "K" to the affidavit of James Kay sworn January 18, 2019 is a Plan of Proceeding or Litigation Plan. Attached as **Exhibit "A"** to this affidavit is a copy of an Amended Litigation Plan. Attached as **Exhibit "B"** is a copy of a redline comparison of the Amended Litigation Plan to the original Litigation Plan.

3. Attached as **Exhibit "C"** to this affidavit is a copy of the Amended and Restated Settlement Agreement between 129 Ontario, Sears Canada Inc. and FTI Consulting Canada Inc., in its capacity as court-appointed monitor dated as of December 14, 2018.

4. Attached as **Exhibit "D"** to this affidavit is a copy of a draft Fresh as Amended Statement of Claim in this action. The court file for this action is currently in the process of being transferred from Milton to the Commercial List. Once the transfer is complete, the Fresh as Amended Statement of Claim will be issued in Commercial List.

5. I make this affidavit in support of a motion for an order certifying this action under the *Class Proceedings Act, 1992*, and for no other or improper purpose.

Sworn before me at the)
City of Toronto,)
in the Province of Ontario)
this 11th day of March, 2019) **ANDY SERETIS**
)

Commissioner for taking affidavits etc.

Georgia Elizabeth Scott-McLaren,
a Commissioner, etc., Province of Ontario,
for Sotos LLP, Barristers and Solicitors.
Expires June 23, 2020.

This is Exhibit **"A"** referred to in the
Affidavit of Andy Seretis sworn before me this
11th day of March, 2019

A Commissioner for taking Affidavits

Georgia Elizabeth Scott-McLaren,
a Commissioner, etc., Province of Ontario,
for Sotos LLP, Barristers and Solicitors.
Expires June 23, 2020.

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFF'S AMENDED LITIGATION PLAN

SECTION 1 - GENERAL

DEFINED TERMS

1.1 In this plan, capitalized terms have the same meaning as given to them in the Statement of Claim, unless otherwise noted. Otherwise:

"**Class Action**" means Ontario Superior Court of Justice Court File No. 4114/15CP.

"**Plaintiff's Counsel**" means, collectively, Sotos LLP and Blaney McMurtry LLP.

"**Class**" means all of the Class Members.

"**Class Member**" or "**Class Members**" means one or more members of the proposed class comprised of:

> *All corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to November 19, 2013.*

"**CPA**" means the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

"**Website**" means https://sotosclassactions.com/cases/current-cases/sears-canada-oppression/.

REPORTING

1.2 Plaintiff's Counsel will report regularly to the Class Members through the Website it maintains for the Class Action. The information on the status of the Class Action will be updated regularly. Plaintiff's Counsel will designate a person or persons to manage the communications with Class Members.

SECTION 2 – CERTIFICATION MOTION

NOTICE

2.1 As part of the certification order, assuming success for the Plaintiff, the Plaintiff will ask the Court to:

(a) Require Sears Canada Inc. ("**Sears**") or its monitor (to the extent it has such information in its possession) to provide contact information for all Class Members within 10 days of the certification Order, if not sooner.

(b) Settle the form and content of the notice of certification (the "**Notice of Certification**"). The Notice of Certification will inform all Class Members of the nature of the claim and their right to opt out; and

(c) Settle the means by which the Notice of Certification will be given to the Class Members (the "**Notice Program**").

2.2 The Plaintiff proposes that the Notice of Certification be distributed in accordance with the following Notice Program:

(a) Email and/or regular mail distribution to the contact information of each Class Member provided by Sears or its monitor; and

(b) Posted in English and French by Plaintiff's Counsel on Plaintiff's Counsel's Website; and provided by Plaintiff's Counsel to any person who requests it.

So long as the list of class members provided by Sears or its monitor is complete and accurate, the Plaintiff does not consider it necessary to cause the Notice to be published in a national newspaper or other medium. However, if such list is found to be materially incomplete or inaccurate, the Plaintiff will request that the defendants pay the cost of publishing the Notice of Certification in such media as is considered necessary in order to come to the attention of the omitted class members.

SECTION 3 – LITIGATION STEPS PRECEDING THE JOINT TRIAL

3.1 After disposition of the certification motion, assuming success for the Plaintiff, Plaintiff's Counsel will ask the Court to set a case conference to schedule the steps in the Class Action. It is anticipated that the litigation steps will be taken in conjunction with the claims being brought by the Monitor, Litigation Trustee and the Pension Administrator (all as defined in the December 3 Order of the Honourable Justice Hainey) (collectively, the "**Other Claims**"). The joint trial for the

Class Action and the Other Claims is scheduled for February, 2020 (the "**Joint Trial**"). It is anticipated that the Class Action, together with the Other Claims, will create a joint trial protocol (the "**Protocol**") that will govern the steps leading up to the Joint Trial. The Protocol will address the following procedural issues:

- Pleadings;
- Document exchange and management;
- Examinations for discovery;
- Expert reports; and
- Motions.

SECTION 4 – TRIAL OF THE COMMON ISSUES

4.1 The Joint Trial will determine the existence and scope of the Defendants' alleged misconduct.

4.2 The Plaintiff will seek determination of common issues (a), (b), (c) and (d)(i) at the Joint Trial (the "**Joint Trial Common Issues**").

4.3 If the Joint Trial Common Issues are answered in favour of the Class, then liability and a determination of aggregate damages will have been established.

4.4 If common issues (a), (b), (c) are answered in favour of the Class, but common issue d(i) is not answered in favour of the Class, then a separate common issues trial will be heard following the Joint Trial to determine aggregate damages in favour of the Class. Further productions, examinations for discovery and expert reports with respect to this separate common issues trial will follow the Joint Trial. Directions in respect of these procedural steps will be sought at the conclusion of the Joint Trial, if required.

4.5 If any of common issues (a), (b) or (c) are not answered in favour of the Class, then there will be no need to determine common issues (d)(i) or (ii).

SECTION 5 – LITIGATION STEPS FOLLOWING THE JOINT TRIAL COMMON ISSUES

5.1 Subject to the Protocol, within 45 days of a decision following determination of the Joint Trial Common Issues, assuming success in favour of the Plaintiff pursuant to paragraph 4.3 above, the parties shall attend a case planning conference to set a schedule and to confirm the process to be followed in bringing the Class Action to final resolution. The process which will be required is dependent on the nature of the decision at the Joint Trial.

5.2 Subject to the Protocol, if liability and aggregate damages are determined at the Joint Trial as per 4.3 above, a plan for distributing the aggregate damage award will be developed by the Plaintiff, in accordance with section 24 of the CPA, to provide fair compensation through an efficient, timely, and impartial distribution process. The plan for distributing the aggregate damage award will be subject to the Plan of Arrangement filed by the monitor in the CCAA filing by Sears.

5.3 Pursuant to subsections 24(2), 24(4) and 26(4) of the CPA, the Court, or a referee if one is appointed, will be asked to determine, based on such evidence as may be necessary, or approve:

(a) The allocation of any aggregate damages recovery among the Class;

(b) Whether part of the award of aggregate damages should be allocated to the Class in proportion to the economic harm suffered; and

(c) Whether the claims of Class Members should be assessed in a summary claims procedure or in some other manner reasonably expected to benefit Class Members.

5.4 Once the division of any aggregate damages award between the Class has been determined and assuming claims may be assessed in a summary claims assessment procedure, the Plaintiff will ask that the Court implement and adopt a claims procedure pursuant to subsections 24(5)-(7) of the CPA, which includes the following steps:

(a) Setting a claims deadline before which eligible Class Members will be required to file their claims for compensation;

(b) Appointment of an administrator to implement the claims process, including the review and assessment of filed claims;

(c) Appointment of a referee to review any issues as to eligibility or the value of claims determined by the administrator, if required;

(d) The right to appeal the referee's decision to the Court for a final and binding decision; and

(e) The creation of a report by the administrator at the conclusion of the claims procedure.

5.5 The Plaintiff will further propose that the claims assessment procedure, wherever practical, utilize:

(a) A paperless, web-based claims and claims management system;

(b) Standardized claims forms and filing procedures;

(c) The Defendants' records as presumptive proof of a Class Member's membership in the class where the Class Member does not contest those records; and

(d) Affidavit or other summary methods for introducing evidence, if necessary.

5.6 As soon as practicable following the expiration of the claims deadline and, if necessary, after any reviews performed by the referee have been completed and appeals resolved, and the amount and number of eligible claims is known, the administrator shall report to the Court on the name, address, and proposed distribution for each eligible Class Member, including his or her prorated share of any punitive damages award or pre- and post-judgment interest award.

5.7 Pursuant to section 26 of the *CPA*, Plaintiff's Counsel shall thereafter seek directions from the Court on a means of distributing any Class Members' awards.

COSTS

5.9 The Plaintiff will ask the Court to order that the Defendants pay all administration costs, including the costs of the notice and the fees of the administrator and referees or alternatively that those costs be paid out of the total recovery after payment of counsel fees, disbursements, and taxes or distribution to the eligible Class Members.

SECTION 6 – AMENDMENTS OF THIS PLAN

6.1 This plan may be amended from time to time by directions given at case management conferences or by further order of the Court.

This is Exhibit **"B"** referred to in the
Affidavit of Andy Seretis sworn before me this
11th day of March, 2019

A Commissioner for taking Affidavits

Georgia Elizabeth Scott-McLaren,
a Commissioner, etc., Province of Ontario,
for Sotos LLP, Barristers and Solicitors.
Expires June 23, 2020.

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(b) Settle the form and content of the notice of certification (the "**Notice of Certification**"). The Notice of Certification will inform all Class Members of the nature of the claim and their right to opt out; and

(c) Settle the means by which the Notice of Certification will be given to the Class Members (the "**Notice Program**").

2.2 The Plaintiff proposes that the Notice of Certification be distributed in accordance with the following Notice Program:

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(b) Posted in English and French by Plaintiff's Counsel on Plaintiff's Counsel's Website; and provided by Plaintiff's Counsel to any person who requests it.

So long as the list of class members provided by Sears or its monitor is complete and accurate, the Plaintiff does not consider it necessary to cause the Notice to be published in a national newspaper or other medium. However, if such list is found to be materially incomplete or inaccurate, the Plaintiff will request that the defendants pay the cost of publishing the Notice of Certification in such media as is considered necessary in order to come to the attention of the omitted class members.

SECTION 3 – LITIGATION STEPS PRECEDING THE ~~COMMON ISSUES~~JOINT TRIAL

~~CASE CONFERENCES~~

3.1 After disposition of the certification motion, assuming success for the Plaintiff, Plaintiff's Counsel will ask the Court to set a case conference to schedule the steps in the Class Action

~~pending the common issues trial. The schedule will include the litigation steps set out below. .~~ It is anticipated that the litigation steps will be taken in conjunction with the claims being brought by the Monitor, Litigation Trustee and the Pension Administrator (all as defined in the December 3 Order of the Honourable Justice Hainey) (collectively, the "**Other Claims**"). The joint trial for the Class Action and the Other Claims is scheduled for February, 2020 (the "**Joint Trial**"). It is anticipated that the Class Action, together with the Other Claims, will create a ~~common issues~~joint trial protocol (the "**Protocol**") that will govern the steps leading up to the ~~trial of all of these actions.~~ Joint Trial. The Protocol will address the following procedural issues:

~~***PLEADINGS***~~

~~3.2 Subject to the Protocol, the Defendants shall provide Statements of Defence no later than 30 days following the date on which the Ontario Superior Court of Justice renders a decision with respect to the certification hearing.~~

~~3.3 The Plaintiff may seek an order from the Court requiring the Defendants to provide their Statements of Defence earlier.~~

~~***DOCUMENT EXCHANGE AND MANAGEMENT***~~

~~3.4 Subject to the Protocol, within 30 days of an order certifying the Class Action, the parties will agree on and implement a discovery plan in accordance with the Sedona Conference Principles and a schedule to engage in meet and confers, subject to this Court's further orders. If there are areas of disagreement, any of the parties may seek direction from the Court.~~

~~3.5 Plaintiff's Counsel anticipates and is able to handle the intake and organization of the number of documents that will likely be produced by the Defendants and will use data management systems to organize, code and manage the documents.~~

~~3.6 The same data management systems will be used to organize and manage all relevant documents in the possession of the Plaintiff.~~

~~***EXAMINATIONS FOR DISCOVERY***~~

~~3.7 Subject to the Protocol, the Plaintiff will conduct an examination for discovery of the individual Defendants and a representative from each of the corporate Defendants but cannot, until the production of documents has been completed, estimate the time required for each examination. Scheduling will also need to include time for receipt of responses to anticipated undertakings and refusals.~~

~~3.8 Subject to the Protocol, the Plaintiff may ask the Court for an order allowing examination of more than one representative of each corporate Defendant, if necessary.~~

~~3.9 Subject to the Protocol, within 120 days of receiving document production, the parties will complete examinations for discovery.~~

~~***EXPERT REPORTS***~~

~~3.10 Plaintiff's Counsel anticipates the exchange of expert reports.~~

~~3.11 Subject to the Protocol, the Plaintiff proposes that all expert reports be exchanged within 60 days of the completion of examinations for discovery, unless the Court orders otherwise.~~

~~3.12 Subject to the Protocol, within 60 days of expert reports being filed, cross-examinations in respect of those reports will be completed.~~

~~***MOTIONS***~~

~~3.13 Subject to the Protocol, at any stage, the Plaintiff may bring a motion asking the Court to clarify or redefine the common issues, if required.~~

~~3.14 Although no motions other than those indicated in this plan are currently anticipated by the Plaintiff, additional motions may be required and will be scheduled as the case progresses.~~

- Pleadings;
- Document exchange and management;
- Examinations for discovery;
- Expert reports; and
- Motions.

SECTION 4 – TRIAL OF THE COMMON ISSUES

4.1 The ~~common issues trial~~Joint Trial will determine the existence and scope of the Defendants' alleged misconduct.

4.2 The Plaintiff will seek determination of common issues ~~trial may also determine on (~~a ~~class-wide basis whether~~), (b), (c) and (d)(i) at the Joint Trial (the "**Joint Trial Common Issues**").

4.3 If the Joint Trial Common Issues are answered in favour of the Class~~ Members suffered loss, leading to a finding of~~, then liability and a determination of aggregate ~~entitlement and/or~~ damages~~.~~ will have been established.

4.4 If common issues (a), (b), (c) are answered in favour of the Class, but common issue d(i) is not answered in favour of the Class, then a separate common issues trial will be heard following the Joint Trial to determine aggregate damages in favour of the Class. Further productions, examinations for discovery and expert reports with respect to this separate common issues trial will follow the Joint Trial. Directions in respect of these procedural steps will be sought at the conclusion of the Joint Trial, if required.

4.5 If any of common issues (a), (b) or (c) are not answered in favour of the Class, then there will be no need to determine common issues (d)(i) or (ii).

SECTION 5 – LITIGATION STEPS FOLLOWING THE JOINT TRIAL COMMON ISSUES ~~TRIAL~~

5.1 Subject to the Protocol, within 45 days of a decision following ~~the common issues trial~~determination of the Joint Trial Common Issues, assuming success in favour of the Plaintiff pursuant to paragraph 4.3 above, the parties shall attend a case planning conference to set a schedule and to confirm the process to be followed in bringing the Class Action to final resolution. The process which will be required is dependent on the nature of the decision at the ~~common issues trial. Two examples of the process which the Court may direct are outlined below.~~Joint Trial.

5.2 Subject to the Protocol, if liability and aggregate damages are determined at the ~~common issues trial~~Joint Trial as per 4.3 above, a plan for distributing the aggregate damage award will be developed by the Plaintiff, in accordance with section 24 of the CPA, to provide fair compensation through an efficient, timely, and impartial distribution process. The plan for distributing the aggregate damage award will be subject to the Plan of Arrangement filed by the monitor in the CCAA filing by Sears.

5.3 Pursuant to subsections 24(2), 24(4) and 26(4) of the CPA, the Court, or a referee if one is appointed, will be asked to determine, based on such evidence as may be necessary, or approve:

(a) The allocation of any aggregate damages recovery among the Class;

(b) Whether part of the award of aggregate damages should be allocated to the Class in proportion to the economic harm suffered; and

(c) Whether the claims of Class Members should be assessed in a summary claims procedure or in some other manner reasonably expected to benefit Class Members.

5.4 Once the division of any aggregate damages award between the Class has been determined and assuming claims may be assessed in a summary claims assessment procedure, the Plaintiff will ask that the Court implement and adopt a claims procedure pursuant to subsections 24(5)-(7) of the CPA, which includes the following steps:

(a) Setting a claims deadline before which eligible Class Members will be required to file their claims for compensation;

(b) Appointment of an administrator to implement the claims process, including the review and assessment of filed claims;

(c) Appointment of a referee to review any issues as to eligibility or the value of claims determined by the administrator, if required;

(d) The right to appeal the referee's decision to the Court for a final and binding decision; and

(e) The creation of a report by the administrator at the conclusion of the claims procedure.

5.5 The Plaintiff will further propose that the claims assessment procedure, wherever practical, utilize:

(a) A paperless, web-based claims and claims management system;

(b) Standardized claims forms and filing procedures;

(c) The Defendants' records as presumptive proof of a Class Member's membership in the class where the Class Member does not contest those records; and

(d) Affidavit or other summary methods for introducing evidence, if necessary.

5.6 As soon as practicable following the expiration of the claims deadline and, if necessary, after any reviews performed by the referee have been completed and appeals resolved, and the amount and number of eligible claims is known, the administrator shall report to the Court on the name, address, and proposed distribution for each eligible Class Member, including his or her prorated share of any punitive damages award or pre- and post-judgment interest award.

5.7 Pursuant to section 26 of the *CPA*, Plaintiff's Counsel shall thereafter seek directions from the Court on a means of distributing any Class Members' awards.

~~5.8 If the Court determines certain common issues in favour of the Class but does not determine liability and award aggregate damages, the amount and distribution of damages would need to be determined in accordance with the provisions of section 25 of the *CPA*.~~

COSTS

5.9 The Plaintiff will ask the Court to order that the Defendants pay all administration costs, including the costs of the notice and the fees of the administrator and referees or alternatively that those costs be paid out of the total recovery after payment of counsel fees, disbursements, and taxes or distribution to the eligible Class Members.

SECTION 6 – AMENDMENTS OF THIS PLAN

6.1 This plan may be amended from time to time by directions given at case management conferences or by further order of the Court.

This is Exhibit **"C"** referred to in the
Affidavit of Andy Seretis sworn before me this
11th day of March, 2019

A Commissioner for taking Affidavits

Georgia Elizabeth Scott-McLaren,
a Commissioner, etc., Province of Ontario,
for Sotos LLP, Barristers and Solicitors.
Expires June 23, 2020.

AMENDED AND RESTATED SETTLEMENT AGREEMENT

Dated as of December 14, 2018

MADE AMONGST:

1291079 ONTARIO INC., IN ITS CAPACITY AS REPRESENTATIVE PLAINTIFF (the "REPRESENTATIVE PLAINTIFF")

- and -

SEARS CANADA INC. ("SCI")

- and -

FTI CONSULTING CANADA INC., IN ITS CAPACITY AS COURT-APPOINTED MONITOR (the "MONITOR")

RECITALS:

WHEREAS the Representative Plaintiff in its capacity as class representative commenced (i) on or about July 5, 2013, a class action lawsuit, bearing court file number 3769/13 CP, against SCI and Sears Roebuck and Co. (collectively, the "**Wishart Class Action Defendants**"), for, among other things, breach of contract and breaches under the *Arthur Wishart Act (Franchise Disclosure),* 2000 (Ontario), which class action was certified pursuant to a decision of the Ontario Superior Court of Justice released on September 8, 2014 (the "**Wishart Class Action**"); and (ii) on or about October 21, 2015, a class action lawsuit, bearing court file number 4114/15 CP, against SCI, Sears Holdings Corporation, ESL Investments and the Directors and Officers (as defined below) (collectively, the "**Oppression Class Action Defendants**"), for, among other things, oppression under the *Canada Business Corporations Act* (the "**Oppression Class Action**", and collectively with the Wishart Class Action, the "**Class Actions**");

AND WHEREAS on June 22, 2017, SCI and certain of its affiliates (collectively, the "**Sears Canada Entities**") commenced proceedings (the "**CCAA Proceedings**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") and obtained an initial order from the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), pursuant to which, amongst other things, FTI Consulting Canada Inc. was appointed as the Monitor;

AND WHEREAS on December 8, 2017, the Court issued a claims procedure order (the "**Claims Order**") requiring certain creditors with claims against the Sears Canada Entities to file proof of their claim with the Monitor by the Claims Bar Date (as defined in the Claims Order and as amended pursuant to an endorsement of Mr. Justice Hainey of the Court made on February 22, 2018);

AND WHEREAS on January 25, 2018, the Court appointed Sotos LLP and Blaney McMurtry LLP as representative counsel ("**Representative Counsel**") to the Class Action Plaintiffs (as defined below) with respect to advancing a claim pursuant to the Claims Order;

AND WHEREAS the Representative Plaintiff filed proofs of claims in respect of each of the Class Actions, asserting, in the case of the Wishart Class Action, a $101,100,446.77 contingent and unliquidated claim against the Wishart Class Action Defendants, and in the case of the Oppression Class Action, a $509,000,000 contingent and unliquidated claim against the Oppression Class Action Defendants respectively (collectively, the "**Class Action Claims**");

AND WHEREAS in order for SCI to be in a position to implement a plan of arrangement or compromise to its creditors (a "**Plan**") and effect distributions pursuant thereto, the Monitor, with the assistance of SCI,

must resolve all material disputed Claims (as defined in the Claims Order), including the Class Action Claims;

AND WHEREAS, the Monitor, SCI, and the Representative Plaintiff have agreed on the treatment of the Class Action Claims for the purposes of voting on, and receiving distributions pursuant to, a Plan.

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which the parties hereto acknowledged, the parties agree as follows:

1 **Defined Terms:** All defined terms used in this amended and restated settlement agreement (this "**Agreement**") and not otherwise defined herein, shall have the meanings ascribed to such terms in **Schedule "A"** hereto.

2 **Class Action Claim Value:** In the event a Plan is implemented, the Representative Plaintiff in the Wishart Class Action, on its own behalf and on behalf of all other class members in the Wishart Class Action, shall have a Proven Affected Unsecured Claim against the Wishart Class Action Defendants of $80,000,000.

3 **Treatment for Distribution Purposes:** In the event a Plan is implemented, the Representative Plaintiff shall only be entitled to receive, in its capacity as Representative Plaintiff, out of Estate Litigation Proceeds, if any, a distribution based on its Proven Affected Unsecured Claim; provided, however, that, (i) the Representative Plaintiff shall not be entitled to receive, or participate in, any distribution on the first $10,000,000 of Estate Litigation Proceeds (the "**Class Action Dividend**"); and (ii) the Upfront Payment (as defined below) shall be treated as an advance payment on the Class Action Dividend and shall be credited against any Class Action Dividend that the Representative Plaintiff would otherwise be entitled to receive out of Estate Litigation Proceeds pursuant to this Agreement. The Upfront Payment is non-refundable in the event that there are no Estate Litigation Proceeds.

4 **Independent Recoveries:** Notwithstanding the Class Action Dividend, the Representative Plaintiff, on its behalf and on behalf of all other plaintiffs under the Class Actions (collectively, the "**Class Action Plaintiffs**"), may settle the Class Actions, and any settlement amount arising therefrom or judgment obtained in favour of the Class Action Plaintiffs shall be paid to or to the benefit of the Class Action Plaintiffs and shall not form part of the Estate Litigation Proceeds or otherwise be available to the general unsecured creditors of SCI.

5 **No Other Claim:** The Representative Plaintiff, on its behalf and on behalf of all other Class Action Plaintiffs, agrees, if a Plan is implemented, not to assert or pursue any further or other claim against the Sears Canada Entities or any of their assets other than its entitlement to receive, the Class Action Dividend and the Upfront Payment. While the Representative Plaintiff, on its behalf and on behalf of all other Class Action Plaintiffs, agrees that it shall not require any discovery, production or payment from the Sears Canada Entities, the Representative Plaintiff confirms that it intends to pursue its claims pursuant to the Class Actions against the defendants to such Class Actions other than the Sears Canada Entities.

6 **Amended and Restated Settlement Agreement Incorporated Into Plan:** The Monitor and SCI shall incorporate the provisions of the herein Agreement into a Plan.

7 **Treatment for Voting Purposes:** The Monitor, SCI and the Representative Plaintiff agree that the Representative Plaintiff shall not be entitled to vote on a Plan.

8 **Payment:** Upon Plan Implementation (which is currently contemplated to be no later than April 30, 2019), the Monitor will cause SCI to make a payment of $334,495 to counsel to the Representative Plaintiff (the "**Upfront Payment**").

9 **Directions by Representative Plaintiff:** The Representative Plaintiff hereby directs the payment of the: (i) Pro Rata Share of Class Action Litigation Proceeds, if any, to the Monitor in trust for distribution to the Directors and Officers with Liquidated Indemnity Claims, if any; (ii) ESL Pro Rata Share of Class Action Litigation Proceeds, if any, to the Monitor in trust for distribution to the ESL Entities with ESL Liquidated Contribution and Indemnification Claims, if any; and (iii) SHC Pro Rata Share of Class Action Litigation Proceeds, if any, to the Monitor in trust for distribution to SHC with SHC Liquidated Contribution and Indemnification Claims, if any.

10 **No Findings.** Nothing in this Agreement shall constitute an admission by SCI or a finding by the Monitor concerning any alleged conduct of the defendants to the Class Actions.

11 **Cooperation:** The Monitor agrees to use best efforts to provide cooperation to the Representative Plaintiff and Representative Counsel to advance the Oppression Class Action, including through the sharing of information and documents, subject to the necessary confidentiality agreements among the parties.

12 **Representation of Representative Plaintiff:** The Representative Plaintiff represents and warrants that:

(a) it has the authority to enter into, execute and deliver this Agreement on behalf of all Class Action Plaintiffs;

(b) that no further or other consent is required for the Representative Plaintiff to enter into, execute and deliver this Agreement on behalf of all Class Action Plaintiffs;

(c) the terms of this Agreement and the effects thereof have been fully explained to the Class Action Plaintiffs;

(d) the Class Action Plaintiffs have received the benefit of counsel in order to fully understand the terms of this Agreement and their effects.

13 **Binding Effect:** This Agreement shall be binding upon, and enure to the benefit of the Representative Plaintiff, the Class Action Plaintiffs, SCI, and the Monitor, and their respective successors and assigns.

14 **Parties in Interest:** Nothing in this Agreement, express or implied, is intended to confer upon any other person any rights or remedies of any nature whatsoever under or by reason or this Agreement. Nothing in this Agreement shall be construed to create any rights or obligations except amongst the parties hereto, and no person or entity shall be regarded as a third-party beneficiary of this Agreement.

15 **Authorized Signatures:** Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Agreement.

16 **Execution in several counterparts:** This Agreement may be executed in several counterparts and by each party on a separate counterpart, each of which when so executed and delivered shall be an original, and all of which together shall constitute one instrument. Delivery of an executed signature page of this Agreement by email or facsimile transmission will be effective as delivery of a manually executed counterpart hereof.

17 **Entire Agreement:** This Agreement expresses the entire understanding of the parties with respect to the Class Action Claims for the purpose of these CCAA Proceedings. No prior negotiations or discussions shall limit, modify, or otherwise affect the provisions hereof.

18 **Governing Laws:** This Agreement shall be governed by, construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein (excluding any conflict of laws rule or principle which might refer such construction to the laws of another jurisdiction) and any dispute arising out of or relating to this Agreement shall be referred to the Court having jurisdiction over the CCAA Proceedings.

[Remainder of this page left intentionally blank.]

IN WITNESS WHEREOF, the Parties have duly executed this Agreement as of the date first above written.

1291079 ONTARIO INC., IN ITS CAPACITY AS REPRESENTATIVE PLAINTIFF

By: _____
Name: Jim Kay
Title: President

SEARS CANADA INC.

By: _____
Name: P. MORRAD
Title: Secretary

FTI CONSULTING CANADA INC., in its capacity as court-appointed monitor of the Sears Canada Entities, and not in its personal or corporate capacity

By: _____
Name:
Title:

IN WITNESS WHEREOF, the Parties have duly executed this Agreement as of the date first above written.

1291079 ONTARIO INC., IN ITS CAPACITY AS REPRESENTATIVE PLAINTIFF

By: _____
Name: Jim Kay
Title: President

SEARS CANADA INC.

By: _____
Name:
Title:

FTI CONSULTING CANADA INC., in its capacity as court-appointed monitor of the Sears Canada Entities, and not in its personal or corporate capacity

By: _____
Name: STEVEN BISSELL
Title: MANAGING DIRECTOR

Schedule "A"

Definitions:

Class Action Litigation Proceeds means any amount that is paid to, or for the benefit of, the Class Action Plaintiffs as a result of Final Orders or settlement of the Class Actions.

Class Action Plaintiffs means all corporations, partnerships, and individuals carrying on business as "Sears Hometown" stores any time after July 5, 2011 pursuant to a standard dealer agreement with SCI under the Class Actions.

Directors and Officers means the directors and officers of SCI named as defendants in the Oppression Class Action.

ESL Contribution and Indemnification Claims means the unliquidated contribution and indemnification claims filed by the ESL Entities against SCI pursuant to the Claims Order.

ESL Entities means ESL Institutional Partners LP, ESL Investments Inc., ESL Investors LLC., and ESL Partners LP, or any one of them.

ESL Liquidated Contribution and Indemnification Claims means the valid and allowed claims of the ESL Entities against SCI which claims have become liquidated and for a sum certain as a result of ESL Contribution and Indemnification Claims having been found valid claims against SCI pursuant to Final Orders or a settlement of any of the Class Actions.

ESL Pro Rata Share means the amount that the ESL Entities would have been entitled to receive pursuant to the Plan had the ESL Contribution and Indemnification Claims been ESL Liquidated Contribution and Indemnification Claims at the time distributions were made.

Estate Litigation Proceeds means net proceeds of litigation against the Directors and Officers, ESL Entities or other third parties which are found to be assets of the estate distributable to unsecured creditors of SCI pursuant to the Plan.

Final Order means an order in respect of which all rights of appeal have been exhausted, or the delay to appeal have lapsed.

Indemnity Claims means the unliquidated indemnification claim filed by the Directors and Officers against SCI pursuant to the Claims Order.

Liquidated Indemnity Claim means the valid and allowed claim of a Director or Officer against SCI which claim has become liquidated and for a sum certain as a result of such Director or Officer, or another person on behalf of such Director or Officer, having to pay an amount pursuant to Final Orders or a settlement of any of the Class Actions.

Pro Rata Share means the amount that the Directors and Officers would have been entitled to receive pursuant to the Plan had the Indemnity Claims been Liquidated Indemnity Claims at the time distributions were made.

SHC Contribution and Indemnification Claims means the unliquidated contribution and indemnification claims filed by SHC against SCI pursuant to the Claims Order.

SHC means Sears Holdings Corporation.

SHC Liquidated Contribution and Indemnification Claims means the valid and allowed claims of SHC against SCI which claims have become liquidated and for a sum certain as a result of SHC Contribution and Indemnification Claims having been found valid claims against SCI pursuant to Final Orders or a settlement of any of the Class Actions.

SHC Pro Rata Share means the amount that SHC would have been entitled to receive pursuant to the Plan had the SHC Contribution and Indemnification Claims been SHC Liquidated Contribution and Indemnification Claims at the time distributions were made.

This is Exhibit **"D"** referred to in the
Affidavit of Andy Seretis sworn before me this
11th day of March, 2019

A Commissioner for taking Affidavits

Georgia Elizabeth Scott-McLaren,
a Commissioner, etc., Province of Ontario,
for Sotos LLP, Barristers and Solicitors.
Expires June 23, 2020.

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC., SEARS HOLDINGS 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*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date October 21, 2015 Issued by _____
Local Registrar

Address of court office: Milton Courthouse
491 Steeles Avenue East
Milton, ON L9T 1Y7

TO: **SEARS CANADA INC.**
290 Yonge Street, Suite 700
Toronto, Ontario
M5B 2C3

AND TO: **SEARS HOLDINGS CORPORATION**
3333 Beverly Road
Hoffman Estates, IL 60179
United States of America

AND TO: **ESL INVESTMENTS INC.**
c/o Polley Faith LLP
Suite 1300 – 80 Richmond St. W.
Toronto, ON M5H 2A4
Harry Underwood
hunderwood@polley.faith.com
Andrew Faith
afaith@polley.faith.com
Jeffrey Haylock
jhaylock@polley.faith.com
Sandy Lockhart
slockhart@polley.faith.com
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Fax: 416-365-1601

AND TO: **WILLIAM C. CROWLEY**
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AND TO: **WILLIAM R. HARKER**
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AND TO: **DONALD CAMPBELL ROSS**
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AND TO: **EPHRAIM J. BIRD**
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AND TO: **DOUGLAS CAMPBELL**
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Fax: 416-640-3207

CLAIM

1. The plaintiff claims on behalf of itself and all members of the Proposed Class:

(a) a declaration that the plaintiff is a "complainant" under the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44 (the "**CBCA**");

(b) a declaration that the plaintiff has been oppressed by the defendants under the CBCA;

(c) compensation pursuant to s. 241(3)(j) of the CBCA in an amount not exceeding $80,000,000;

(d) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

(e) costs of this action on a substantial-indemnity scale, plus applicable goods and services and harmonized sales taxes; and;

(f) such further and other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

Parties

2. The plaintiff, 1291079 Ontario Limited ("**129**"), is incorporated under the laws of Ontario. Until December, 2013, 129 carried on business in the Town of Woodstock, Ontario, as a retailer under the "Sears Hometown" store program. 129 is the class

representative in a certified class proceeding against Sears Canada Inc., bearing Court File No. CV- 3769 /13-CP (the "**Class Action**") commenced in Milton, Ontario

3. The defendant, Sears Canada Inc. ("**Sears**"), is incorporated under the laws of Canada and has its head office in the City of Toronto, Province of Ontario. Sears' stock is publicly traded on the Toronto Stock Exchange and on the NASDAQ.

4. The defendant, Sears Holdings Corporation ("**Holdings**"), is incorporated under the laws of the State of Delaware in the U.S.A. Until October, 2014, Holdings owned 51% of the common shares of Sears, at which time its shareholdings were reduced to approximately 12% following a sale of its shares. On October 15, 2018, Holdings filed for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court.

5. The defendant, ESL Investments Inc. ("**ESL**"), is incorporated under the laws of the State of Delaware in the U.S.A. ESL is a privately-owned hedge fund controlling over approximately $9 billion in assets. Until October, 2014, ESL was a 27% shareholder of Sears, at which time it increased its shareholdings in Sears to approximately 48% through the acquisition of shares previously held by Holdings.

6. The principal individual behind both Holdings and ESL is hedge-fund billionaire Edward Lampert ("**Lampert**"). Lampert is the chairman and CEO of Holdings and the founder, chairman and CEO of ESL. Lampert is also the largest individual shareholder of Holdings.

7. Holdings and ESL are affiliates of Sears as defined under section 2 of the CBCA.

8. The defendant, William C. Crowley ("**Crowley**"), is an individual residing in New York, New York in the United States of America. Crowley was a director of Sears in 2013.

9. The defendant, William R. Harker ("**Harker**"), is an individual residing in Brooklyn, New York in the United States of America. Harker was a director of Sears in 2013.

10. The defendant, Donald Campbell Ross ("**Ross**"), is an individual residing in Toronto, Ontario. Ross was a director of Sears in 2013.

11. The defendant, Ephraim J. Bird ("**Bird**"), is an individual residing in Salado, Texas in the United States of America. Bird was a director of Sears in 2013.

12. The defendant, Deborah E. Rosati ("**Rosati**"), is an individual residing in Wainfleet, Ontario. Rosati was a director of Sears in 2013.

13. The defendant, R. Raja Khanna ("**Khanna**"), is an individual residing in Toronto, Ontario. Khanna was a director of Sears in 2013.

14. The defendant, James McBurney ("**McBurney**"), is an individual residing in London, England. McBurney was a director of Sears in 2013.

15. The defendant, Douglas Campbell ("**Campbell**"), is an individual residing in Toronto, Ontario. Campbell was a director of Sears in 2013.

16. Crowley, Harker, Ross, Bird, Rosati, Khanna, McBurney and Campbell are hereinafter, collectively, referred to as the "**Directors**".

17. At all material times, including on November 18, 2013 through December 6, 2013, Holdings, ESL, Lampert, and Harker (collectively, the "**Primary Shareholders**") were a direct or beneficial shareholder of Sears, and held the following ownership interests:

(a) Holdings beneficially owned 51,962,391 shares in Sears, representing approximately 51% of the outstanding shares;

(b) ESL beneficially owned 17,725,280 shares in Sears, representing approximately 17.4% of the outstanding shares, which were directly held as follows:

i. ESL Partners, LP – 15,821,206 shares;

ii. SPE I Partners, LP – 830,852 shares;

iii. SPE Master I, LP – 1,068,522 shares;

iv. ESL Institutional Partners, LP – 4,381 shares; and

v. CRK Partners, LLC (an affiliate of ESL that was voluntarily cancelled effective June 1, 2018, and is not a party to these proceedings – 319 shares;

(c) Lampert owned 10,433,088 shares in Sears, representing approximately 10.2% of the outstanding shares; and

(d) Harker owned 4,604 shares in Sears.

Background

18. 129 is a Sears Hometown Store dealer. Hometown Store dealers, before they were all shut down, were small hardware and appliance stores operated by independent retailers pursuant to a Dealer Agreement with Sears. The Hometown Dealers operated under the "Sears" brand.

19. On July 5, 2013, 129 commenced a class proceeding against Sears on behalf of all Hometown Store dealer stores operating under a Dealer Agreement with Sears at any time on or after July 5, 2011 (hereinafter collectively referred to as the "**Class**" or "**Hometown Dealers**")). The Class Action seeks $100 million in damages on behalf of the Class for, *inter alia*, breach of contract and breaches of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("**Wishart Act**").

20. The Class Action was certified as a class proceeding on September 8, 2014.

21. 129 proposes that the class in this action be defined in the same manner as the class in the Class Action, namely:

> all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to June 22, 2017

Overview of the Claim

22. ESL—acting at all times at founder and namesake Lampert's direction—engaged in serial asset stripping, taking Sears's best assets out of the enterprise and away from the

claims of creditors, including the Class, so as to monetize these assets and have those funds delivered to ESL and Holdings by way of dividend and before its inevitable insolvency proceedings. Over the course of Lampert's and ESL's reign, Sears closed hundreds of stores, cut thousands of jobs, and lost untold billions in value. In effect, Lampert and ESL managed Sears as if it were a private portfolio company that existed solely to provide the greatest returns on their investment, recklessly disregarding the damage to Sears, its employees, and its creditors, including the Class.

23. In November and December 2013, the Directors issued and paid an extraordinary dividend in the amount of approximately $509 million which was made possible by ESL and the Directors' asset stripping, conflict of interest, and self-dealing. The extraordinary dividend was oppressive and unfairly disregarded and prejudiced the interests of the Class.

The Beginning of the End for Sears

24. Sears is a retailer of home appliances, furnishings, mattresses, electronics and apparel, among other things. It has operated in Canada for over 60 years. Sears' retail network includes many different channels of retail, such as full-line department stores, furniture and appliance stores, Dealer Hometown stores, catalogue selling locations, and outlet stores. Sears also sells direct to customers through its website, www.sears.ca and its 1-800 telephone number.

25. Beginning in 2011, Sears' financial performance began to decline sharply. According to Sears' publicly-disclosed audited annual financial statements for 2010 – 2013

(as amended, in certain cases) Sears' revenues operating profits/losses and gross margin rates were as follows:

Year	Total Revenues ($ million)	Operating Profit (Loss) ($ millions)	Gross Margin Rate
2010	4,938.5	106.3	39.3%
2011	4,619.3	(50.9)	36.5%
2012	4,300.7	(82.9)	36.7%
2013	3,991.80	(187.8)	36.2%

26. As early as 2011, Sears' management recognized that drastic, transformative action would be required for Sears to re-establish a foothold in the Canadian retail market. In the 2011 strategic plan (the **2011 Strategic Plan**) prepared for Sears' board of directors (the **Board**), then-Chief Executive Officer Calvin McDonald ("**McDonald**") described the state of Sears as follows:

> Sears Canada is not a good retailer. Our business is broken; trading is awkward and inefficient, we lack product and merchandising focus and we are becoming irrelevant to customers while losing touch with our core.
>
> […]
>
> We lack many of the fundamental processes, structures and culture of a strong retailer. In short, we lack "retail rhythm". However most of our challenges are self-induced, meaning we are in a position to fix them.

27. The 2011 Strategic Plan also made clear that if transformative action was not taken, Sears could not expect to re-emerge as a successful retailer: "If we do not innovate, we

will cease to be relevant." More directly, the 2011 Strategic Plan warned that "the current trajectory of growth and margin decline would take EBITDA into negative territory if we do not take drastic action."

28. Notwithstanding the concerning operational trends identified in the 2011 Strategic Plan, Sears failed to take the necessary action to reinvigorate its business. Between 2011 and 2013, Sears consistently invested fewer resources on growth and transformational initiatives relative to its industry peers. In particular, the Board of Directors for Sears rejected multiple attempts by management, including, in particular, McDonald, to use Sears' capital to revitalize its business.

2013 Plan to Dispose of Real Estate Assets to Fund Dividends (the Monetization Plan)

29. By 2013, ESL and Lampert had an immediate need for cash from Sears. ESL had raised money from investors years earlier on terms that precluded these investors from redeeming their investment for a period of time. In 2013, this holding period expired, investors were entitled to withdraw funds and ESL investors faced significant redemptions.

30. In order to satisfy its redemption obligations, ESL and Lampert devised a plan to extract cash from Sears through (a) the disposition of its most valuable real estate assets, and (b) the payment of an extraordinary dividend for the benefit of ESL and Lampert (collectively, the "**Monetization Plan"**).

31. To give effect to the Monetization Plan, Lampert personally directed the disposition of Sears' real estate assets in 2013. Lampert provided specific instructions to Sears on the price sought by Sears for its dispositions.

32. At all material times, Lampert directed and acted in concert with officers and directors of Sears to implement the Monetization Plan, including, in particular, with Crowley (then Chair of the Sears Board), Harker (then a director of Sears) and E.J. Bird (then Chief Financial Officer of Sears). Jeffrey Stollenwerck (then President, Real Estate Business Unit of Holdings) was also engaged by ESL and Lampert on these matters. Lampert had a long standing professional and personal relationship with each of them:

(a) Crowley had acted as President and Chief Operating Officer of ESL from January 1999 to May 2012, Executive Vice-President and Chief Administrative Officer of Holdings from September 2005 to January 2011 and Chief Financial officer of Holdings for periods in 2005-2007;

(b) Harker was an Executive Vice-President and General Counsel of ESL from February 2011 to June 2012 and an officer of Holdings from September 2005 until August 2012, during which time he acted variously as General Counsel, Corporate Secretary and Senior Vice-President, among other roles;

(c) Bird was the Chief Financial Officer of ESL from 1991 to 2002; and

(d) Stollenwerck was the President of the Real Estate Business Unit of Holdings from February 2008 to April 2018 and a Senior Vice President, Real

Estate for Holdings from March 2005 to February 2008. Before joining Holdings, Stollenwerck had acted as Vice-President, Research at ESL.

33. In accordance with the Monetization Plan, Sears entered into an agreement with Oxford Properties Group on or about June 14, 2013, to terminate Sears' leases at Yorkdale Shopping Centre and Square One Mississauga in exchange for a payment to Sears of $191 million (the "**Oxford Terminations"**). The Oxford Terminations closed June 24, 2013.

September 2013 Board Presentations

34. On September 23, 2013, two years after the 2011 Strategic Plan, the Board of Directors for Sears received a series of management presentations directly addressing Sears' deteriorating operational and financial performance (the "**2013 Board Presentations**"). Among other things, the 2013 Board Presentations reported that:

(a) sales continued to decline across Sears' business at a rate of 2.6% per year;

(b) based on year-to-date current trends (and without appropriately accounting for stores closed in connection with the Monetization Plan), Sears' projected EBITDA by 2016 would be negative $105 million; and

(c) Sears was struggling operationally: "Basics not fixed".

35. Earlier that month, presentations to the Board had also recognized that competition in the Canadian retail space was increasing with Target's entry into the market. Target had

opened 68 stores in Canada in the second quarter of 2013 and planned to open a further 124 stores in Canada by year end.

36. On or about September 24, 2013, MacDonald (Sears then CEO) resigned from the company. MacDonald resigned because of disagreements with Lampert over commitment to MacDonald's turnaround plan for Sears. That same day, Sears announced that Campbell was appointed its CEO and President.

37. Following the 2013 Board Presentations, the Board knew or ought to have known that Sears' business was in decline and that its long term viability was at risk.

Continued Disposition of Real Estate Assets

38. Further to the Monetization Plan, Sears pursued an agreement with Cadillac Fairview Corporation Limited ("**Cadillac Fairview**") to terminate five additional high-value leases (Toronto Eaton Centre, Sherway Gardens, Markville Shopping Centre, Masonville Place and Richmond Centre) (the "**Cadillac Terminations**").

39. Lampert directed the negotiating strategy in connection with the Cadillac Terminations with a view to ensuring a dividend of the proceeds before the end of 2013. Rowley and Stollenwerck negotiated directly with Cadillac Fairview, including with respect to the final price of $400 million.

40. On October 28, 2013, the Board approved the Cadillac Terminations. The Board was not advised of the role that Lampert, Crowley or Stollenwerck had played in

negotiating the Cadillac Terminations. The Cadillac terminations closed on November 12, 2013.

41. In the same period, Sears and Stollenwerck negotiated the sale of Sears' 50% interest in eight properties jointly owned with The Westcliff Group of Companies. Sears' 50% interest was sold to Montez Income Properties Corporation in exchange for approximately $315 million (the "**Montez Sale**").

42. The Sears Board approved the Montez Sale on November 8, 2013. The approval was made by written resolution and without an in-person board meeting.

43. The Montez Sale closed in January 2014.

44. The assets disposed of by Sears were its "crown jewels". It was plain that the divestiture of these key assets in 2013, while Sears was struggling in the face of stiffer retail competition from Target and others, would have a dramatic negative impact on Sears. The negative impact, in fact, unfolded:

Year	Total Revenues ($ million)	Operating Profit (Loss) ($ millions)	Gross Margin Rate
2012	4,300.7	(82.9)	36.7%
2013	3,991.8	(187.8)	36.2%
2014	3,424.5	(407.3)	32.6%
2015	3,145.5	(298.3)	31.8%
2016	2,613.6	(422.4)	27.3%

45. Lampert directed Sears to complete each of the Oxford Terminations, the Cadillac Terminations and the Montez Sale. These dispositions were part of the Monetization Plan and completed in order to provide ESL with funds to address its redemption obligations.

The 2013 Dividend

46. On November 12, 2013, the same day Sears received $400 million in proceeds from the Cadillac Terminations, Crowley directed Bird to move forward with an extraordinary dividend of between $5.00 and $8.00 per share.

47. On November 18 and 19, 2013, six days after the closing of the Cadillac Terminations, the Board held an in-person meeting (the "**November Meeting**"). Although Sears had no business operations in the United States, the November Meeting was held in New York City at the Offices of Wachtel, Lipton, Rosen & Katz ("**Wachtel**").

48. The November Meeting began with a short pre-dinner discussion on November 18 and continued with a full day session on November 19, 2013.

49. During the short pre-dinner discussion on November 18, 2013, the Board unanimously resolved to declare the 2013 Dividend, an extraordinary dividend of $5.00 per common share, for an aggregate dividend payment of approximately $509 million (the "**2013 Dividend**").

50. The circumstances surrounding the 2013 Dividend raised a series of red flags.

Lack of Notice to the Board

51. The Board had no advance notice that it would be asked to consider an extraordinary dividend at the November Meeting.

52. On Friday, November 15, 2013, the Board was provided with a package of material for the November Meeting (the "**Board Materials**"). The Board Materials included a detailed agenda with 15 separate items for the Board to consider during the November Meeting.

53. Neither the agenda nor any of the other Board Materials made any reference to the fact that the Board would be asked to consider an extraordinary dividend or any dividend at all. Moreover, the possible payment of a dividend had not been tabled in any prior Board meeting in 2013.

Lack of Information

54. The Board was not provided with the information necessary to assess the appropriateness of an extraordinary dividend.

55. Unlike past instances in which the Board was asked to consider an extraordinary dividend, the Board Materials did not contain any financial or operational information regarding the payment of a proposed dividend. The Board did not receive:

(a) any written materials regarding a proposed dividend or possible dividend structures;

(b) any written presentation analyzing the impact of the proposed dividend would have on Sears' business, including taking into account possible downside scenarios;

(c) any *pro forma* assessment of Sears' liquidity and cash flows following the payment of a dividend. Rather, the *pro forma* cash flows included in the Board Materials assumed that no dividend would be paid in either 2013 or 2014; or

(d) no financial statement was available which addressed the outstanding liability created by the Class Action. No contingency reserve was set aside and no written description of the existence of the Class Action was provided to the Board.

56. While Sears' management had identified the need to provide the Board with various cash flow analyses covering various dividend scenarios, the limited analysis that was done by management was incomplete and never presented to the Board.

57. Moreover, and unlike past meetings in which the Board had considered extraordinary dividends:

(a) management did not prepare a written presentation to the Board on the proposed dividend and there was no written recommendation or proposal from management to the Board; and

(b) the Directors were not provided with legal advice with respect to their duties in connection with the declaration of a dividend.

Financial Uncertainty

58. On November 12, 2013, prior to the November Meeting, the Board received a financial update on the performance of Sears. Management reported that throughout the first three quarters of the year, Sears had negative net income of $49 million ($27 million worse than the same period in 2012) and negative total cash flow of $26.3 million.

59. On November 14, 2013, the Investment Committee of Sears' Board was presented with material showing an estimated pension plan deficiency of $313 million at December 2013. The members of the Investment Committee were Crowley, Harker and Bird. This fact was not presented to the Board at the November Meeting.

60. In advance of the November Meeting, the Board was provided with only high level *pro forma* cash flows for 2014. The cash flows were based on a 2014 Plan EBITDA of $135 million, of which $118 million was based on aspirational changes to the business that management hoped would result in financial improvement but that management and the Board should have known were unreasonably optimistic. Moreover, the *pro forma* cash flows presented to the Board assumed the receipt of proceeds of the Montez Sale even though the transaction had not closed. Again, no information was provided to the Board on the impact of an extraordinary dividend would have on future investment opportunities and future cash flows.

61. The Board Materials did, however, include two analyst reports, both of which reviewed the financial circumstances of Sears and predicted its eventual failure:

Desjardins Capital Markets Report (October 30, 2013)

> As long as consumers do not perceive that Sears Canada is going out of business and desert it, Sears may be able to manage its demise slowly over time, selling prime and non-core assets, and waiting for the elusive purchaser of 60-80 store locations to appear.

CIBC Report (November 4, 2013)

> It is possible that SCC will simply operate its way into irrelevance, gradually selling off stores to stem the cash drain. That strategy would likely result in Sears occasionally cutting a special dividend cheque to all shareholders, not the worst way to create shareholder value. But that is dangerous to the operations, particularly as the primary, and most profitably flagship stores are vended.

A Conflicted Board

62. The 2013 Dividend was approved by the Board unanimously and without any abstentions.

63. Crowley and Harker participated in the Board's deliberations to pay the 2013 Dividend and approved the payment of the 2013 Dividend despite the fact that Sears had specifically determined that:

(a) Crowley and Harker were not "independent" directors; and

(b) pursuant to National Instrument 52-110, Crowley and Harker had a material relationship with Holdings and/or ESL that could "be reasonably expected to interfere with the exercise of [their] independent judgment".

64. Further, Crowley did not disclose to the Board that he, Lampert and Stollenwerck were personally involved in the 2013 real estate divestitures or that the timetable and size

of the proposed dividend was dictated by ESL's need for funds. Rather, the Board was led to believe that Sears' management was responsible for the 2013 real estate divestures. For example, Crowley expressly advised the independent members of the Board: "I do not think that the Board or the independents should attempt to insert themselves in the negotiations [of real estate transactions]. Bill [Harker] and I did not and do not do that."

65. Crowley and Harker in particular were focused on the interests of ESL and Lampert. Crowley and Harker failed to disclose the motivations of ESL and Lampert to the Board and the fact that both the real estate dispositions and 2013 Dividend were driven by the needs of ESL and Lampert and not the best interests of Sears and its other stakeholders, including the Class.

Departure from Past Governance Practices

66. The Board process for the 2013 Dividend represented a sharp departure from past practice of the Sears Board and ordinary standards of good corporate governance.

67. For example, in December 2005, the Board approved an extraordinary dividend. The process for approving that dividend included:

(a) multiple Board meetings on September 7, 2005, September 14, 2005, and December 2, 2005, to discuss the merits and risks of a potential dividend in light of the company's operational needs;

(b) multiple oral presentations from management and a dividend recommendation by the Chief Financial Officer;

(c) separate meetings between the independent directors of Sears and the Chief Financial Officer to assess the company's financial state;

(d) legal advice from both in-house and external counsel to the Board; and

(e) review by the Board of draft press releases and an officer's certificate with respect to the dividend.

68. In May 2010, the Board approved another extraordinary dividend, again with the benefit of a robust process:

(a) multiple meetings of the Board on April 23, 2010, May 7, 2010, and May 18, 2010, to discuss the merits and risks of a potential dividend in light of the company's operational needs;

(b) separate meetings of the independent directors on May 7, 2010, and May 12, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operation needs;

(c) multiple presentations by management, including a 40-page presentation dated April 23, 2010, and a subsequent 20-page presentation dated May 7, 2010,

providing detailed analyses of excess cash and financial forecasts (with downside scenarios) for multiple dividend options;

(d) a dialogue between management and the Board continuing over several meetings with respect to various options for a potential dividend;

(e) consideration of multiple potential uses for excess cash, including cash dividends in various amounts, a substantial issuer bid and a normal course issuer bid; and

(f) a deferral of half of the proposed dividend pending a full assessment of the company's operational needs.

69. In September 2010, the Board approved a second extraordinary dividend for 2010. The process for approving that dividend included:

(a) multiple meetings of the Board on or around August 23, 2010, and September 10, 2010, to discuss the capital structure of the company and the merits and risks of a potential dividend in light of the company's operational needs;

(b) multiple presentations by management, including a "capital structure update" dated August 3, 2010, and a 32-page presentation assessing the capital structure of the company and potential dividend options, including financial forecasts and downside scenarios, which the Board reviewed in advance of approving the dividend; and

(c) a separate meeting of the independent directors on or around September 8, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operational needs.

70. In December 2012, the Board approved a smaller extraordinary dividend. While not as fulsome as previous governance processes, the process for approving the 2012 dividend nonetheless included:

(a) a meeting on December 12, 2012, which included thorough discussion and analysis of the impact of a potential dividend on available cash, EBITDA and total debt, the company's need to retain cash for operational uses and downside scenarios in respect of a possible dividend;

(b) a report entitled "Dividend Discussion" which was prepared by Sears' Chief Financial Officer and which the Board reviewed in advance of approving the dividend; and

(c) a review of the draft officer's certificate with respect to the dividend by external counsel to the independent directors and a dialogue with the Chief Financial Officer of Sears addressing counsel's comments.

71. In stark contrast, the 2013 Dividend was the first item of business at a pre-dinner discussion at the outset of the November Meeting and was declared without any adequate financial, operational or cash flow information upon which the exercise proper business

judgment. It was dealt with before any of the planned presentations to the Board, which addressed Sears' financial results or the reports on management priorities, asset valuations, operating efficiency and Sears' 2014 financial plan and without the benefit of any independent legal advice regarding the directors' duties in the circumstances.

72. The Board's inability to make a proper business decision in respect of the 2013 Dividend was apparent from the fact that one of the Board members, Weissman, had been appointed to the Board that day. Weissman, a resident of Texas, had no material prior dealings with Sears or knowledge of Sears' financial or operational circumstances upon which to base his decision to approve the 2013 Dividend.

The Hometown Dealers' Interest in the Affairs of Sears

73. The 2013 Dividend was declared by the Directors and paid by Sears with knowledge by the defendants of the substantial claim against Sears by the Hometown Dealers in the Class Action.

74. The defendants knew that by implementing and proceeding with the Monetization Plan, culminating in the 2013 Dividend, that Sears would likely be unable to pay the damages of the Class if and when the Class succeeded in the Class Action.

75. The Class' claim was sizeable when compared to the assets of Sears at the time of the 2013 Dividend, its overall liabilities in 2013, its grim financial outlook, and its increasingly rapid financial deterioration. As a result, the Class had a direct financial interest in how Sears was being managed.

76. The Class was in a position of inequality of power and knowledge vis-à-vis the defendants and was unable to exert any influence over their decisions. The Class had no legal right to influence or change conduct contrary to Sears' interests, and to the interests of its creditors and other stakeholders.

77. The Class, in good faith, attempted to protect its interests, but the defendants ignored the Class' attempts.

(a) On November 26, 2013, after the declaration of the 2013 Dividend but prior to its payment, counsel for the plaintiff in the Class Action wrote to counsel for Sears requesting assurances that, having regard to the assets, liabilities (existing and contingent) and actual and likely future operating losses of Sears, it had set aside a sufficient reserve to satisfy a judgment against Sears should the Class Action be certified and succeed on the merits. No answer was provided.

(b) On December 3, 2013, counsel for the plaintiff in the Class Action wrote to each Director to put them on notice that should Sears be unable to satisfy an eventual judgment against Sears in the Class Action, that each Director who authorized the 2013 Dividend may be jointly and severally liable with Sears for such damages. No answer was provided.

78. The defendants ignored the Class' letters and paid the 2013 Dividend on December 6, 2013.

The Hometown Dealers' Reasonable Expectations

79. At the time the Monetization Plan was being implemented and the 2013 Dividend was issued, the Hometown Dealers were creditors of Sears with a claim of up to $100 million. As creditors, the Hometown Dealers' reasonable expectations were as follows:

(a) the Directors would not cripple Sears' ability to pay the Hometown Dealers by implementing and continuing the Monetization Plan and declaring the 2013 Dividend.

(b) the Directors, the management of Sears, and the Primary Shareholders would factor in its ability to pay the Hometown Dealers, as creditors, before continuing with the Monetization Plan, and declaring and paying the 2013 Dividend;

(c) the Directors, the management of Sears, and the Primary Shareholders would not engage in the Monetization Plan by stripping Sears of its best assets and selling Sears' crown jewels, and significantly erode its capitalization to the disadvantage of Sears' creditors, including the Hometown Dealers;

(d) the affairs of Sears would be conducted by the Defendants honestly, fairly and in good faith, in relation to the interests of the Hometown Dealers, and in a manner that did not unfairly prejudice or affect the Hometown Dealers' interests as creditors; and,

(e) the Directors would exercise care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances before the Directors implemented, and continued with, the Monetization Plan and declared the 2013 Dividend.

The 2013 Dividend Provided No Value to Sears

80. The 2013 Dividend provided no value to Sears and solely benefited its direct and indirect shareholders, including ESL, Lampert and Harker. The amounts of the gratuitous benefit received by them were:

(a) ESL: $88,626,400;

(b) Lampert: $52,165,440; and

(c) Harker: $23,020.

81. The Defendants also caused approximately $259 million to be paid to Holdings through the 2013 Dividend.

Non-Arm's Length Dealings

82. At all material times:

(a) Holdings was the controlling shareholder of Sears, was a related entity to Sears and was not dealing at arm's length with Sears;

(b) ESL and Lampert exercised both *de facto* and *de jure* control over Holdings. As Holdings stated in its 2013 Annual Report, Lampert had "substantial influence over many, if not all, actions to be taken or approved by our stockholders"; and

(c) ESL and Lampert were not dealing at arm's length with Sears as a result of their direct and indirect beneficial control position in Holdings, which in turn held a controlling interest in Sears. Further, Holdings, ESL and Lampert collectively held more than 75% of Sears' shares. ESL, Lampert and Holdings (at the direction of ESL and Lampert) acted in concert with respect to the control of Sears and specifically acted in concern and with a single mind to exercise influence over Sears in connection with the 2013 Dividend and the Monetization Plan.

83. As a result of these relationships, each of Holdings, ESL, Lampert and Sears are related entities who are presumed not to have acted at arm's length in respect of the 2013 Dividend. ESL and Lampert used their position of control over Sears to direct and/or influence Sears and its directors to carry out the Monetization Plan and the 2013 Dividend.

The Defendants' Actions were Oppressive and Unfairly Prejudicial to and Unfairly Disregarded the interests of the Plaintiff

84. The Defendants' actions in implementing the Monetization Plan and paying the 2013 Dividend were done for the purpose of denuding Sears of its prime assets and reducing its capitalization, and paying the funds from the realization of the assets to the

primary benefit of Holdings and ESL to the detriment of the Class. These actions were oppressive and unfairly prejudicial to and unfairly disregarded the interests of the Class.

85. The 2013 Dividend was effected by the defendants for the primary purpose of satisfying the immediate financial needs of ESL and Lampert and in reckless disregard of the reasonable expectations of Sears' creditors, including the Class. The 2013 Dividend was made with the specific intention to prioritize the interests of Lampert, ESL, and Holdings over Sears' creditors, including the Class, and other stakeholders.

86. In particular, considering the surrounding circumstances, the defendants knew but unfairly disregarded the fact that the 2013 Dividend would have a material adverse impact on its ability to continue as a viable business and pay its creditors, including the Class. In particular, the 2013 Dividend was:

(a) a non-arm's length transaction made outside the usual course of business;

(b) paid in the face of significant outstanding indebtedness to Sears' creditors, including the Class, in circumstances where:

i. Sears had dwindling operating income to repay its debts, including to the Class and other creditors;

ii. applying reasonable assumptions, the Board could only reasonably have expected Sears to be significantly cash flow negative from 2014 onwards;

iii. the Board had no real plan to repay such indebtedness;

iv. Sears was aggressively liquidating its prime assets and would continue to do so in the future;

v. Sears was experiencing growing, unsustainable operating losses each quarter and would continue to do so in the future;

vi. the defendants Holdings and ESL were not prepared to allow Sears to commit the funds and resources necessary to implement a viable turnaround of Sears' operations, and that MacDonald and other executives had resigned as a result;

vii. Sears was slashing its operating budget which would deprive it of the ability to effect a turnaround of its operations and would continue to do so in the future;

viii. the Sears Hometown stores network was and would continue in the future to be abandoned by Sears. Every senior executive involved in the Sears Hometown store network either left the organization or would leave in the near future as a result of this abandonment and the growing despair of the independent dealer network; and

ix. the class members, which are independent owner operators of Sears Hometown stores, were experiencing and would continue to

experience massive, unsustainable losses which would lead to their financial demise.

(c) paid in circumstances that raise a series of "red flags", including as a result of the following facts:

i. the 2013 Dividend was declared with unusual haste and with no advance notice to the Board;

ii. the 2013 Dividend was declared in the absence of proper Board materials and with a deficient corporate governance process;

iii. the Board received no independent legal advice to properly discharge its duties with respect to a material transaction involving related parties: Holdings, ESL and Lampert;

iv. the divestiture of Sears' crown jewel assets had an obvious negative impact on its business;

v. Sears had not addressed its negative cash flows or operational challenges despite years of effort;

vi. there were clear conflicts of interest within the Board and management at the time the 2013 Dividend was declared; and

vii. the 2013 Dividend was driven by ESL, Lampert, Bird as Chief Financial Officer of Sears and Crowley and Harker as non-

independent directors of Sears in order to satisfy ESL's urgent need for funds.

87. In March of 2014, the Board was presented with a proposal for a further, more modest dividend on short notice. The proposed dividend was not approved by the Board due to concerns about Sears' financial position, only three months after the payment of the 2013 Dividend.

88. At all material times, Holdings and ESL controlled and directed Sears and directed the payment of the 2013 Dividend by Sears. The Directors voted for and consented to the resolution authorizing the payment of the 2013 Dividend. The defendants have interfered with the plaintiff's and the Class' rights as creditors of Sears.

89. Specifically, by directing and authorizing Sears to pay the 2013 Dividend and its other actions as described above, the defendants have:

(a) effected a result;

(b) carried on their business and affairs and those of Sears in a manner; and

(c) exercised their powers in a manner,

that was oppressive and unfairly prejudicial to and that unfairly disregarded the interests of the Class, contrary to section 241 of the CBCA.

90. The plaintiff and the Class are complainants under ss. 238(d) of the CBCA.

91. The plaintiff pleads and relies on the CBCA, and particularly Part XX thereof.

The Continuing Path Towards Insolvency

92. Following the payment of the 2013 Dividend on December 6, 2013, Sears continued aggressively down the path of winding-up operations in Canada and liquidating what remained of its valuable assets.

93. Having received the 2013 Dividend and facing its own financial issues, on May 14, 2014, Holdings announced that it was exploring strategic alternatives for its shareholding in Sears, including a possible divestiture of its shares. Holdings retained the firm of Bank of America Merrill Lynch for this purpose.

94. In May, 2014, Sears announced that it had sold its minority ownership interest in the Centre commercial Les Rivières shopping centre in Trois-Rivières, Quebec, for $33.5 million.

95. In August, 2014, Sears announced that it had entered into an agreement to sell its interest in Kildonan Place, a shopping centre located in Winnipeg, for $33.5 million.

96. In September, 2014, Sears announced that Campbell would resign as CEO by the end of the year.

97. In October, 2014, Ronald Boire ("**Boire**") was named as Campbell's replacement as CEO. Boire was Sears' third different CEO in just under two years.

98. In November, 2014, Sears and JPMorgan Chase Bank, N.A. announced that their agreement relating to the Sears-branded credit card would terminate on November 15, 2015.

99. In February, 2015, Sears released its financial results for the previous quarter and fiscal year. Sears suffered an operating loss of $154.7 million for the last quarter of 2014. For the 2014 fiscal year, Sears suffered an operating loss of $407.3 million.

100. In March 11, 2015, Sears announced that it had entered into an agreement to sell and lease back three of its properties for $140 million. The locations include store space and adjacent property located at the Metropolis at Metrotown in Burnaby, British Columbia, Cottonwood Mall in Chilliwack, British Columbia and North Hill Shopping Centre in Calgary, Alberta.

101. On May 20, 2015, Sears released its financial performance for the first quarter of 2015. Sears suffered a $59.1 million net loss for this quarter.

102. On July 2, 2015, Boire announced that he would be leaving his position as CEO of Sears by the end of the 2015 summer.

103. All of the Hometown Dealer stores have closed.

Sears Enter CCAA Proceedings

104. On June 22, 2017 Sears and a number of its operating subsidiaries sought and obtained an initial order (as amended and restated on July 13, 2017, the "**Initial Order**"),

under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") (collectively the "**CCAA Proceedings**").

105. On July 18, 2017, as part of the CCAA Proceedings, the Court issued an order approving an agreement and a process for the liquidation of inventory and FF&E at certain initial closing Sears locations, which liquidation process is now complete.

106. On October 13, 2017, as part of the CCAA Proceedings, the Court issued, among other orders, an order approving an agreement and a process for the liquidation and the inventory and FF&E at all remaining Sears retail locations, which liquidation commenced shortly thereafter and is now completed.

107. The liquidation of assets at Sears retail locations is now completed, all retail locations are closed, and leases in respect of such locations have been disclaimed or surrendered back to the landlord.

108. All of the Hometown Dealers stores have closed and there will be available to the creditors of Sears, including the Hometown Dealers, only pennies on the dollar after its liquidation, a fate which was materially exacerbated by the Monetization Plan and the issuance of the 2013 Dividend.

109. Effective as of December 14, 2018, the Monitor, which had run a claims process in the CCAA, entered into an amended and restated settlement agreement with the Class (the "**Agreement**"). In the Agreement, the Monitor agreed that, in the event a Plan of Arrangement to be filed by Sears in the CCAA Proceedings is implemented, the Class in

the Class Action would have a proven unaffected unsecured claim against Sears of $80,000,000.

110. The Agreement will form part of the Plan of Arrangement. The Directors and ESL have each filed an indemnity claim in the CCAA proceedings and will be bound to the Plan of Arrangement, including the Agreement, if the Plan of Arrangement is approved.

111. The plaintiff seeks to have this action proceed and be tried together with the following related actions:

(a) Sears Canada Inc., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C. v. ESL Investments Inc., et al. bearing Court File No. CV-18-006111214-00CL;

(b) Morneau Shepell Ltd. in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan v. ESL Investments Inc. et al., bearing Court File No. CV-18-00611217-00CL; and,

(c) FTI Consulting Canada Inc., in its capacity as Court-appointed monitor in proceedings to the Companies Creditors Arrangement Act, RSC 1985, c. c-36 v. ESL Investments Inc. et al., bearing Court File No. CV-18-00611219-00CL.

October 21, 2015

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1291079 ONTARIO LIMITED Plaintiff	-and-	SEARS CANADA INC., et al. Defendants

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT MILTON

FRESH AS AMENDED STATEMENT OF CLAIM

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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

SUPPLEMENTARY MOTION RECORD (CERTIFICATION)

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