

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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

Plaintiff

- and -

**ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL
INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER
and WILLIAM CROWLEY**

Defendants

Court File No. CV-18-00611214-00CL

AND BETWEEN:

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

- and -

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

Defendants

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

AND BETWEEN:

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

Plaintiff

- and -

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

Defendants

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

AND BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

**REPLY MOTION RECORD OF THE DEFENDANTS
BIRD, CAMPBELL, CROWLEY, HARKER, MCBURNEY, ROSS, ROSATI AND KHANNA
(Returnable before the Honourable Justice McEwen on September 19, 2019)**

September 6, 2019

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Douglas Campbell, William Crowley, William
Harker, James McBurney and Donald Ross

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Lawyers for the Defendants
Deborah E. Rosati and R. Raja Khanna

TO: **Litigation Service List**

AND TO: **The Service List in the CCAA proceedings of Sears Canada Inc.**

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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BETWEEN:

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

Plaintiff

- and -

**ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL
INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER
and WILLIAM CROWLEY**

Defendants

AND BETWEEN:

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

- and -

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

Defendants

AND BETWEEN:

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

Plaintiff

- and -

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

Defendants

AND BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

AFFIDAVIT OF DONALD CAMPBELL ROSS

(Sworn September 6, 2019)

I, Donald Campbell Ross, of the City of Toronto, in the Province of Ontario, and the City of Bridgeport, Connecticut, MAKE OATH AND SAY:

1. I am one of the defendants in three of the four above-noted proceedings (collectively, the "**Actions**"). As such, I have knowledge of the matters contained in this affidavit, except where I have stated such knowledge to be based on information and belief from others, in which case I verily believe such information to be true.

2. I swear this affidavit to supplement my affidavit sworn August 26, 2019 ("**First Ross Affidavit**") and to reply to the affidavits of Steven Bissell, sworn September 3, 2019 ("**Bissell Affidavit**") and Eun Ji Yoon, sworn September 3, 2019, filed in the plaintiffs' joint responding motion record. I adopt all defined terms used in the First Ross Affidavit for the purpose of this reply affidavit.

Response to Plaintiffs' Document Request

3. On August 30, 2019, counsel to the Litigation Trustee wrote to counsel for the Former Directors requesting certain information and documents in advance of their cross-examination of me and examinations of other Former Directors on this pending motion. A copy of this letter is attached hereto as **Exhibit "A"**.

4. On September 6, 2019, counsel to the Former Directors responded to this letter, providing copies of certain documents responsive to the plaintiffs' requests. A copy of this letter (without enclosures) is attached hereto as **Exhibit "B"**.

5. For ease of reference, the enclosures to the letter attached at Exhibit "B" are attached as separate exhibits to this affidavit, as follows:

(a) In response to item 4:

- (i) The email from John Birch to various insurers of Sears Canada Inc., dated March 8, 2018, is attached hereto as **Exhibit "C"**; and
 - (ii) The email from John Birch to various insurers of Sears Holdings Corporation, dated March 19, 2018, is attached hereto as **Exhibit "D"**.
- (b) In response to item 5, the email from Covington to QBE dated November 19, 2018 is attached hereto as **Exhibit "E"**. The email has been redacted for privilege.
- (c) In response to item 6, the letter from Covington to Paul T. Curley of Kaufman Borgeest & Ryan LLP, counsel to Lloyd's of London, dated June 17, 2019 is attached hereto as **Exhibit "F"**;
- (d) In response to item 7:
- (i) The letter from Covington to Tammy Yuen, dated June 7, 2019 is attached hereto as **Exhibit "G"**;
 - (ii) Emails dated June 21, 2019 from Covington to counsel to the 2013-2014 SHC excess insurers are attached as follows:
 - (A) The email to Endurance American Insurance Co. is attached hereto as **Exhibit "H"**;
 - (B) The email to North River Insurance Co. is attached hereto as **Exhibit "I"**;
 - (C) The email to Berkley Insurance Co. is attached hereto as **Exhibit "J"**;

- (D) The email to AXIS Insurance Company is attached hereto as **Exhibit “K”**;
 - (E) The email to Allied World National Assurance Company is attached hereto as **Exhibit “L”**;
 - (F) The email to Aspen American Insurance Company is attached hereto as **Exhibit “M”**;
 - (G) The email to AIG / Illinois National Insurance Company is attached hereto as **Exhibit “N”**;
 - (H) The email to Navigators Insurance Company is attached hereto as **Exhibit “O”**;
 - (I) The email to Lloyds, London is attached hereto as **Exhibit “P”**; and
 - (J) The email to Chubb / Westchester Fire Insurance Company is attached hereto as **Exhibit “Q”**;
- (e) In response to item 8, the email from counsel to XL Insurance Company Ltd., to Natalie Levine, dated July 15, 2019 is attached hereto as **Exhibit “R”**;
- (f) In response to item 9:
- (i) The letter from counsel to XL to John Birch, dated November 7, 2018 is attached hereto as **Exhibit “S”**;
 - (ii) The email from David A. Luttinger, Jr. of Covington to Tammy Yuen, dated May 2, 2019 is attached hereto as **Exhibit “T”**.

- (iii) The email from counsel to XL to Natalie Levine, dated June 24, 2019 is attached hereto as **Exhibit "U"**; and
- (iv) The email from Natalie Levine to Tammy Yuen, dated July 10, 2019 is attached hereto as **Exhibit "V"**.

I am advised by John N. Birch that, because the attachments to Exhibits "C", "D", and "H" to "Q" are voluminous, they have not all been included in the exhibits to this affidavit, but they have been provided to the plaintiffs electronically.

Notice Provided to Plaintiffs and the Court Regarding Insurance Issues

6. In response to, and to supplement, the chronology set out at paragraph 5 of the Bissell Affidavit, I note the following:


- (a) With respect to the case conference held on May 27, 2019, described at paragraph 5(g) of the Bissell Affidavit, I am advised by Christopher Horkins, a partner with CBB who attended the case conference, that in addition to what is set out in the Bissell Affidavit, Justice McEwen and the other parties in attendance were advised that QBE's denial of coverage may impact the litigation timetable and trial scheduling;
- (b) With respect to the case conference held on June 27, 2019, described at paragraph 5(k) of the Bissell Affidavit, I am advised by John Picone, a partner with CBB who attended the case conference, that, in addition to what is set out in the Bissell Affidavit, Justice McEwen and the other parties in attendance were advised that the Former Directors' insurance coverage issues would need to be resolved before certain aspects of any litigation timetable, such as a mediation, could proceed;

(c) With respect to the case conference held on July 12, 2019, described at paragraph 5(m) of the Bissell Affidavit. I am advised by Mr. Horkins, who attended the case conference, that Justice McEwen and the other parties in attendance were advised that the Former Directors' ongoing insurance coverage issues remained unresolved and may require follow up, including in relation to the timetable, and that the Former Directors would keep Justice McEwen and the other parties apprised of any developments in the insurance coverage dispute that may impact the litigation as they arise.

SWORN BEFORE ME at the City of Toronto,
in the Province of Ontario on September 6,
2019.



Commissioner for Taking Affidavits
(or as may be)



Donald Campbell Ross

Date:

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TO: **Litigation Service List**

AND TO: **The Service List in the CCAA proceedings of Sears Canada Inc.**

FTI CONSULTING CANADA INC.
J. DOUGLAS CUNNINGHAM, Q.C.
MORNEAU SHEPELL LTD.
1291079 ONTARIO LIMITED
Plaintiffs

-and- ESL INVESTMENTS INC et
al.

Defendants

Court File No.: CV-18-00611219-00CL
Court File No. CV-18-00611214-00CL
Court File No. CV-18-00611217-00CL
Court File No. CV-19-617792-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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TORONTO

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Lawyers for the Defendants,
Ephraim J. Bird, Douglas Campbell,
William Crowley, William Harker,
James McBurney and Donald Ross

This is Exhibit "A" referred to in the Affidavit of Donald
Campbell Ross sworn September ..6....., 2019

A handwritten signature in black ink, appearing to be 'C. H.', written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

Matthew P. Gottlieb

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August 30, 2019

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Dear Counsel:

***Sears Canada Inc. v. ESL Investments Inc. et al.* – Examinations on Motion to Vary Timetable**

As you know, examinations of Ephraim J. Bird, Douglas Campbell, William Crowley, William Harker, R. Raja Khanna, James McBurney, Deborah Rosati and Donald Ross (the “**Former Directors**”) on the pending motion to vary the timetable for the abovenamed and three other related proceedings (the “**Actions**”) are scheduled to take place on September 9-11.

Given the late filing of the Motion Record and the resulting compressed timeline for this motion, the Plaintiffs want to ensure that the examinations are conducted as efficiently as possible. Accordingly, we request that you provide the following documents and/or information as soon as possible, and at any rate before the close of business on Thursday, September 5:

1. Personal net worth and income statements as of July 31, 2019, for each of the Former Directors;
2. The total legal costs incurred by each of your firms on behalf of the Former Directors for which coverage has been sought under insurance policies issued to Sears Canada Inc. (“**SCI**”) and/or Sears Holdings Corp. (“**SHC**”), broken down by month and including a list of those costs which remain unpaid. To be clear, we are not seeking dockets, only monthly totals;

3. The total legal costs paid by the Former Directors or your firms to coverage counsel, including Covington & Burling LLP ("**Covington**") and Tyr LLP, relating to the Former Directors' insurance coverage in respect of the Actions;
4. The notices from Cassels Brock & Blackwell LLP ("**CBB**") to SCI's and SHC's insurers dated March 2018, referred to in paragraph 17 of the affidavit of Donald Ross sworn August 26, 2019 (the "**Ross Affidavit**");
5. The email from Covington to QBE Insurance Corp. dated November 19, 2018, referred to in paragraph 23 of the Ross Affidavit;
6. The letter from Covington to counsel for Lloyd's dated June 17, 2019, referred to in paragraph 33 of the Ross Affidavit;
7. The notice from Covington to SHC's insurers dated June 21, 2019, referred to in paragraph 36 of the Ross Affidavit;
8. The email from XL Insurance Company Ltd. and/or XL Specialty Insurance Company ("**XL**") to CBB dated July 15, 2019, referred to in paragraph 46 of the Ross Affidavit; and
9. Any correspondence regarding the funding status of insurance policies issued to SCI or SHC under which coverage has been sought in connection with the Actions, including all correspondence from XL regarding the amounts available under the 2015 XL policy.

Failure to provide this information will needlessly complicate the examinations of the Former Directors. We reserve the right to bring any non-compliance to the attention of the Court and to ask the Court to draw an adverse inference regarding the Former Directors' capacity to fund their own defences.

Yours truly,



Matthew P. Gottlieb

cc: Andrew Winton, Philip Underwood, *Lax O'Sullivan Lisus Gottlieb LLP*
Robert Frank, Evan Cobb, *Norton Rose Fulbright Canada LLP*
Michael Barrack, Kiran Patel, Brittny Rabinovitch, *Blake, Cassels & Graydon LLP*
David Sterns, *Sotos LLP*
Lou Brzezinski, *Blaney McMurtry LLP*

This is Exhibit "B" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6....., 2019

A handwritten signature in black ink, appearing to be 'C. H. Ross', written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)



September 6, 2019

By Email

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Attention: Matthew Gottlieb

Dear Counsel:

Re: Sears Canada Inc. v ESL Investments Inc. et al - Examinations on Motion to Vary Timetable

Further to your letter dated August 30, 2019, we provide the following responses to your requests for documents and/or information in advance of the examinations on our clients' pending motion to vary the timetable in these actions:

1. ***Personal net worth and income statements as of July 31, 2019, for each of the Former Directors;***

Response: The requested information will be provided for defendants Donald Ross, Douglas Campbell, Ephraim J. Bird and James McBurney under separate cover, subject to the confidentiality terms that we discussed yesterday, to be formalized, without prejudice to our position that such information and the Former Directors' ability to interim fund defence costs is not relevant to the issues to be determined on the motion.

The requested information will not be provided for William Harker and William Crowley. Each of Mr. Harker and Mr. Crowley stipulate that they have sufficient assets to interim fund their respective *pro rata* share of the currently anticipated legal fees that will be incurred until the dispute with the insurance companies is resolved. To be clear, we do not agree that their ability to interim fund is relevant to the issues to be determined on the motion.

2. ***The total legal costs incurred by each of your firms on behalf of the Former Directors for which coverage has been sought under insurance policies issued to Sears Canada Inc. ("SCI") and/or Sears Holdings Corp. ("SHC"), broken down by month and including a list of those costs which remain unpaid. To be clear, we are not seeking dockets, only monthly totals;***

Response: Since July 15, 2019, our clients have incurred legal fees of approximately CAD\$260,000. We decline to provide any further information on the basis of privilege and relevance.



September 6, 2019
Page 2

3. ***The total legal costs paid by the Former Directors or your firms to coverage counsel including Covington & Burling LLP ("Covington") and Tyr LLP, relating to the Former Directors' insurance coverage in respect of the Actions;***

Response: As of August 31, 2019, the Former Directors have incurred total legal costs of approximately CAD \$535,000 by these two firms (CAD\$70,000 relating to Tyr LLP and USD\$350,000 relating to Covington).

4. ***The notices from Cassels Brock and Blackwell LLP ("CBB") to SCI's and SHC's insurers dated March 2018, referred to in paragraph 17 of the affidavit of Donald Ross sworn August 26, 2019 (the "Ross Affidavit");***

Response: Please see attached:

- a. Email from John Birch to various insurers of Sears Canada Inc., dated March 8, 2018, and attachments; and
- b. Email from John Birch to various insurers of Sears Holdings Corporation, dated March 19, 2018, and attachments.

5. ***The email from Covington to QBE Insurance Corp. dated November 19, 2018, referred to in paragraph 23 of the Ross Affidavit;***

Response: Please see attached email from Covington to QBE Insurance Corp. dated November 19, 2018. The email has been redacted for privilege.

6. ***The letter from Covington to counsel for Lloyd's dated June 17, 2019, referred to in paragraph 33 of the Ross Affidavit;***

Response: Please see attached letter from Covington to Paul T. Curley of Kaufman Borgeest & Ryan LLP, counsel to Lloyd's of London, dated June 17, 2019.

7. ***The notice from Covington to SHC's insurers dated June 21, 2019, referred to in paragraph 36 of the Ross Affidavit;***

Response: Please see attached:

- a. Letter from Covington to Tammy Yuen of Skarzynski Marick & Black LLP, counsel to XL, dated June 7, 2019; and
- b. Emails dated June 21, 2019 from Covington to counsel to the 2013-2014 SHC excess insurers, and their attachments.



September 6, 2019
Page 3

8. The email from XL Insurance Company and/or XL Specialty Insurance Company ("XL") to CBB dated July 15, 2019, referred to in paragraph 46 of the Ross Affidavit;

Response: Please see attached email from Tammy Yuen to Natalie Levine, dated July 15, 2019. This email has been redacted to remove privileged and irrelevant information.

9. Any correspondence regarding the funding status of insurance policies issued to SCI or SHC under which coverage has been sought in connection with the Actions, including all correspondence from XL regarding the amounts available under the 2015 XL policy;

Response: Please see attached:

- a. Letter from Paul J. Stein, QC of Gowling WLG, counsel to XL, to John Birch, dated November 7, 2018;
- b. Email from David A. Luttinger, Jr. of Covington to Tammy Yuen, dated May 2, 2019;
- c. Emails between Tammy Yuen and Natalie Levine dated June 24, 2019; and
- d. Email from Natalie Levine to Tammy Yuen, dated July 10, 2019.

This correspondence has been redacted to remove privileged and irrelevant information.

We trust that this letter and its enclosures satisfies your requests.

Yours truly,

Cassels Brock & Blackwell LLP

John N. Birch

Partner

Services provided through a Professional
Corporation

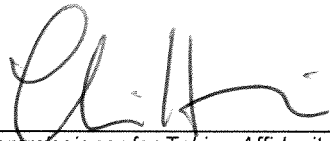
Enclosures



September 6, 2019
Page 4

cc: Richard Swan and Jason Berall, Bennett Jones LLP
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Robert Frank and Evan Cobb, Norton Rose Fulbright Canada LLP
Michael Barrack, Kiran Patel and Brittiny Rabinovitch, Blake Cassels and Graydon LLP

This is Exhibit "C" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019



Commissioner for Taking Affidavits (or as may be)

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Cc: [Levine, Natalie](mailto:Natalie.Levine@CasselsBrock.com); [Buttery, Mary I.A.](mailto:Mary.I.A.Buttery@CasselsBrock.com); [Birch, John](mailto:John.Birch@CasselsBrock.com)

Subject: Notice of Actual and Potential Claims against certain former directors and officers of Sears Canada Inc. [IWOV-LEGAL.FID2704142]

Date: Thursday, March 08, 2018 1:01:30 PM

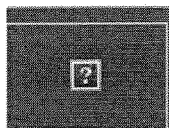
Attachments: [image001.gif](#)
[Notice of Potential Claims FINAL March 8, 2018.PDF](#)
[Order Re Litigation Investigator dated March 2 2018.PDF](#)
[10--Amendment of Statement of Claim in Karine Tremblay action \(Quebec\).PDF](#)
[13--Notice to Insurer of Potential Claims - Everest.PDF](#)
[13--Notice to Insurer of Potential Claims - AIG.PDF](#)
[13--Notice to Insurer of Potential Claims - AXIS.PDF](#)
[13--Notice to Insurer of Potential Claims - XL Specialty Insurance Company.PDF](#)
[13--Issued Employee Representative Counsel Order \(July 13, 2017\) \(1\).PDF](#)
[12--Ltr to AXIS Reinsurance and Sears D&Os re Notice of D&O Claims Feb 9, 2....PDF](#)
[12--Ltr to Everest Insurance and Sears D&Os re Notice of D&O Claims Feb 9,PDF](#)
[12--Ltr to AIG and Sears D&Os re Notice of D&O Claims Feb 9, 2018.PDF](#)
[12--Ltr to XL Insurance and Sears D&Os re Notice of D&O Claims Feb 9, 2018.PDF](#)
[11--XL Specialty Insurance Scanned Ltr.PDF](#)
[11--AIG Insurance Scanned Ltr.PDF](#)
[11--Axis Reinsurance Scanned Ltr.PDF](#)
[11--Everest Insurance Company Scanned Ltr.PDF](#)
[9--Sears letter to Bentall re North Hills Centre December 29, 2017.PDF](#)
[9--Concord p5999720@sears.ca 20171229 141144 \(1\).PDF](#)
[9--1616 - 14th Avenue N.W., Calgary - City of Calgary December 2017.PDF](#)
[9--1616 - 14th Avenue N.W., Calgary - HH-BH Letter December 2017 \(2\).PDF](#)
[9--500 Wilfred Hamel Blvd Quebec City - Ministry of Sustainable Development....PDF](#)
[9--1616 - 14th Avenue N.W., Calgary - Alberta Environment and Parks Decembe....PDF](#)
[9--500 Wilfred Hamel Blvd Quebec City - City of Quebec City December 2017.PDF](#)
[9--500 Wilfred Hamel Blvd Quebec City - Encadrements Ste-Anne December 2017.PDF](#)
[9--40 Alliance Blvd - Mike Dejean December 2017.PDF](#)
[9--40 Alliance Blvd - Ontario Ministry Of the Environment and Climat....PDF](#)
[10--Lettre d A. Mojtahedi \(NRF\) n++ D. Bourgoin et B. Gamache \(actions collect....PDF](#)
[9--40 Alliance Blvd - Michael Basen December 2017.PDF](#)
[7--Letter to Special Committee of the Board of Directors of Sears Canada da....PDF](#)
[8--Sears Canada letter to Rossclair August 1, 2017.PDF](#)
[8--ROSSCLAIR letter to Sears - July 26, 2017.PDF](#)
[7--Letter from Bennett Jones to McMillan.PDF](#)
[6--Cadillac Fairview \(Davies\) Letter to Everest Insurance.PDF](#)
[6--Cadillac Fairview \(Davies\) Letter to XL.PDF](#)
[6--Cadillac Fairview \(Daves\) Letter to AIG - CFCL.PDF](#)
[6--Cadillac Fairview \(Davies\) Letter to Axis.PDF](#)
[5--2018-02-23 - LT Sears & XL Specialty Insurance w encls.PDF](#)
[5--2018-02-23 - LT Sears & AXIS Reinsurance Company w encls.PDF](#)
[5--2018-02-23 - LT Sears & AIG Insurance w encls.PDF](#)
[5--2018-02-23 - LT Sears & Everest Insurance w encls.PDF](#)
[3--Letter re Sears Canada D&O Claims Feb 8, 2018 - Morneau.PDF](#)
[1--Notice of Action brought by 1291079 Ontario Limited February 9, 2018.PDF](#)
[2--Letter Re Sears - Notice of Claims, February 9 2018 - Koskie \(pensioners\).PDF](#)
[4--Letter from counsel for RioCan February 9, 2018.PDF](#)

Our firm is counsel to 13 former officers/directors of Sears Canada Inc.

We are writing to you in you capacity as providers of D&O insurance that covers such individuals.

Please find attached our Notice of Actual and Potential Claims. The notice contains numerous other attached documents that are referenced in Appendix A to the claims notice.

We look forward to receiving confirmation of receipt of this claims notice.



John Birch

Direct: +1 416 860 5225 • Fax: +1 416 640 3057 • jbirch@casselsbrock.com
 2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3C2
www.casselsbrock.com



Services provided through a Professional Corporation

This is Exhibit "D" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019



Commissioner for Taking Affidavits (or as may be)

From: Birch, John
To: claims@beazley.com; UKFIclaims@aon.co.uk; NewLoss@agcs.allianz.com; ClaimsNAFinPro_CorporateSolutions@swissre.com; c-claim@aig.com; specialtynewloss@cna.com; notice@lvclaims.com; londonmarketd&oclaims@hiscox.com; usfnol@axiscapital.com; ra.admin@argore.com; ClaimNotice@oldrepublicpro.com
Cc: proclaimnewnotices@xlcatlin.com; Hoogenband, Patricia; Buttery, Mary I.A.; Levine, Natalie
Subject: Notice of Claims and Potential Claims to Excess D&O Insurers of Sears Holdings Corporation
Date: Monday, March 19, 2018 4:28:56 PM
Attachments: [image001.gif](#)
[Notice of Potential claims \(Sears Holdings D&O\) March 14, 2018.PDF](#)
[Sears Holdings Corporation D&O Insurance Layers 2017-2018.PDF](#)
[Order Re Litigation Investigator dated March 2 2018.PDF](#)
[Notice of Potential Claims FINAL March 8, 2018.pdf](#)

Our firm is legal counsel to numerous former officers and directors of Sears Canada Inc.

We are writing to you in your capacities as the excess D&O insurers of Sears Holdings Corporation. The attached "Sears Holdings Corporation D&O Insurance Layers 2017-2018" document sets out the relevant policy numbers and insurer names for the primary layer of coverage as well as each of the 13 excess layers of coverage. That document will, therefore, allow you to determine which of your policies will respond to these claims.

Please see the following documents that are attached to this email:

- (a) Written notice of actual and potential claims under D&O Policy issued to Sears Holdings Corporation;
- (b) Copy of written notice of actual and potential claims under D&O policies issued to Sears Canada Inc.; and
- (c) Copy of court order dated March 2, 2018.

We previously provided notice of these claims to the primary insurer, XL, on March 14, 2018. However, it was not until today that we learned the details of the excess policies issued by you.

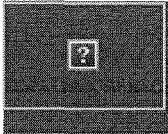
This notice is also being copied to the primary insurer, XL, solely for the purpose of informing it that we have now given notice to all of the excess insurers.

The Notice of Potential Claims refers to numerous attachments that total tens of Megabytes of data. From our past experience with giving notices to insurers, insurers' email systems typically reject claims notices containing large attachments. Therefore, please get in contact with my assistant, Patricia Hoogenband (who is copied on this email), who can make arrangements to get you copies of the full list of documents referred to in the attached notice.

As the claims notice indicates, the directors of Sears Canada Inc. need to incur defence costs immediately. Therefore, please get in touch with me at your earliest convenience to discuss any issues relating to the payment of legal fees. Further, coverage will need to be coordinated as between the Sears Holdings Inc. D&O policy and the four D&O coverage layers of Sears Canada Inc.

John Birch

Direct: +1 416 860 5225 • Fax: +1 416 640 3057 • jbirch@casselsbrock.com



2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3C2
www.casselsbrock.com
Services provided through a Professional Corporation

This is Exhibit "E" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019



Commissioner for Taking Affidavits (or as may be)

From: "Hahn, Andrew W" <ahahn@cov.com>
Sent: Monday, November 19, 2018, 6:18 PM
To: "johanna.fricano@us.qbe.com" <johanna.fricano@us.qbe.com>
Cc: "Luttinger, David A Jr." <dluttinger@cov.com>; "Duke, Benjamin" <pbduke@cov.com>
Subject: QBE Policy No. QPL0045025; Canadian CCAA proceedings regarding Sears Canada in the Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL)
Attachments: LF Tammy Yuen September 18, 2018.pdf; LF Paul Stein October 22, 2018.pdf; LF Tammy Yuen October 23, 2018.pdf; LT Stein October 30, 2018 (response to Oct 22 letter).pdf; LF Paul Stein November 7, 2018.pdf; Motion Record of the Monitor (TUV Approval) - 05Nov2018.pdf; 2018 11 05 - Litigation Investigator_s First Report.pdf; 2018 11 05 - Notice of Motion re Litigation Trustee.pdf; 2018 11 05 - Litigation Trustee Appointment Order.pdf

Dear Johanna,

We understand that you are responsible for handling claims under Policy No. QPL0045025 issued to Sears Holdings Corporation ("SHC") by QBE Insurance Corporation for the period of May 15, 2015 to May 15, 2016.

We write on behalf of certain former directors of Sears Canada, Inc. ("SCI") to provide a further update to the information that Carolyn Rosenberg of Reed Smith LLP sent to QBE by email dated September 10, 2018, regarding claims made against former directors and officers of SCI in Canadian CCAA proceedings in the Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL) (the "Claims").

Please acknowledge receipt of this email and let us know if there is someone else at QBE with whom we should communicate concerning coverage under the above-referenced policy.

As set forth in the attached correspondence, XL Specialty Insurance Company ("XL"), which issued the primary policy underlying the QBE policy, has asserted that certain Claims in the Canadian CCAA proceedings are interrelated to a claim first made in the 129 Ontario Action during the 2015–2016 policy period. Ms. Rosenberg forwarded the 129 Ontario Action to QBE in her September 10, 2018 email. Among other things, XL specifically asserts that both the 129 Ontario Action and many of the Claims "include allegations that Sears Canada improperly paid dividends to its shareholders and such payments significantly compromised Sears Canada's ability to meet its financial obligations."

In light of the above, XL determined that the 2015–2016 SHC primary policy issued by XL responds to all Claims that relate to dividend payments at issue in the 129 Ontario Action. XL also concluded that certain other Claims are allocable to the 2017–2018 primary D&O policy that XL issued to SCI.

What follows is an update on the Canadian CCAA proceedings. Canadian law firm Cassels Brock & Blackwell LLP is representing certain director and officers in the proceedings. This update provides information about (a) coverage issues, (b) recent developments in the CCAA proceedings including a motion that seeks approval for the commencement or continuance of five separate actions against directors of SCI and other parties, (c) other steps being taken to defend the Claims, and [REDACTED]

(a) Coverage of Defense Expenses

Over the last several weeks, Cassels Brock has been in communication with XL regarding the primary D&O policies that it issued to SHC and SCI. By letter dated October 22, 2018, XL agreed to pay defense expenses (as defined under the policies) on the terms set out in that letter.

[REDACTED]

As set forth in Cassels Brock's letter to XL's counsel dated October 30, 2018, the former SCI directors and officers largely accepted XL's above proposal. Thereafter, by letter dated November 7, 2018, XL's counsel advised that a total of US\$12 million of the US\$15 million limit under the 2015–2016 SHC primary policy had previously been paid by XL in connection with other claims for coverage under that policy. As a result, the remaining available limits under the 2015–2016 SHC primary policy total US\$3 million.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(b) Recent Developments in the CCAA Proceedings

The CCAA Monitor and the Litigation Investigator served certain motions against the SCI directors in the CCAA proceedings on November 5, 2018. The motions consist, in general terms, of the following:

- (i) First, the CCAA Monitor filed a motion seeking permission of the court to bring a claim under section 96 of the Bankruptcy and Insolvency Act against two directors (William Crowley and William Harker), as well as Edward Lampert and his company, ESL, arising out of the payment by SCI of a \$509 million dividend on December 6, 2013. The theory of the Monitor's proposed claim is that this dividend payment represented a transfer at undervalue; that Mr. Lampert and ESL are liable to repay the portion of the overall dividend that they received; and that Messrs. Crowley and Harker are personally liable under the statute because they were "privies" to the transaction when the Sears Canada board approved the dividend. In this motion, the Monitor also seeks an order (using a specific set-off scheme) that effectively limits the ability of the directors to recover materially from SCI under their corporate indemnifications and contemplates that SCI will deliver a CCAA plan that may circumvent the directors' ability to otherwise object to or vote on such plan.
- (ii) Second, the Litigation Investigator reported on potential claims that may be asserted and recommended that a court-appointed Litigation Trustee be established to advance claims for breach of fiduciary duty, breach of the duty of care, oppression, and conspiracy against individuals including many of the former directors of SCI represented by Cassels Brock. The other defendants to the claims would be ESL and Mr. Lampert. These claims would also relate to the approval and payment of the \$509 million payment by SCI in December 2013. The litigation by the Litigation Trustee (and the other litigation by the Monitor) would be funded using monies in

the Sears Canada estate. The Litigation Investigator also recommended that separate litigation be brought directly by other parties against the Directors, Lampert, and ESL (see the details below) and that the existing 2015 prospective class action brought by 1291079 Ontario Limited relating to the Hometown Sears (the "129 Ontario Action") dealers should proceed.

The 129 Ontario Action has been stayed since June 22, 2017 by the initial order made in the Sears Canada CCAA proceedings.

The Litigation Investigator further seeks an order that sets out a protocol for document discovery, examinations for discovery, and a common trial of all of the proceedings. [REDACTED]

Copies of the motions records served by the Monitor and the Litigation Investigator are enclosed.

The Litigation Investigator proposes that the Litigation Trustee's claim be asserted against all individuals who were SCI directors when the 2013 dividend was approved. The Litigation Investigators alleges that these individuals were as follows: William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney, and Douglas Campbell. Cassels Brock currently represents all of these individuals EXCEPT Raja Khanna and Deborah Rosati, who are represented by Bennett Jones LLP.

In sum, it appears likely that five separate actions will proceed against the directors, as follows:

- (i) continuation of the 129 Ontario Action, including a motion to certify it as a class proceeding;
- (ii) the Monitor's proposed claim under section 96 of the BIA;
- (iii) the claim by the Litigation Trustee, described above;
- (iv) a direct claim for breach of fiduciary duty, knowing assistance, knowing receipt, and conspiracy by the SCI pension administrator (Morneau Sheppell); and
- (v) a direct claim for oppression, breach of fiduciary duty, breach of the standard of care, knowing receipt, knowing assistance, and conspiracy brought by SCI's pensioners.

The two motions are scheduled to be heard on December 3, 2018. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
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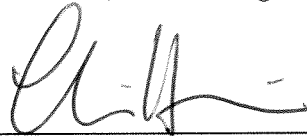
Andrew

Andrew Hahn

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1071 | ahahn@cov.com
www.cov.com

COVINGTON

This is Exhibit "F" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6....., 2019

A handwritten signature in black ink, appearing to be "A. H.", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
 LONDON LOS ANGELES NEW YORK PALO ALTO
 SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
 The New York Times Building
 620 Eighth Avenue
 New York, NY 10018-1405
 T +1 212 841 1000

By Electronic Mail

June 17, 2019

Paul T. Curley
 Kaufman Borgeest & Ryan LLP
 200 Summit Lake Drive
 Valhalla, New York 10595

**Re: Lloyd's Policy No. FD1581481;
 CCAA Proceedings Regarding Sears Canada, Inc.;
 Demand for Excess DIC Drop-Down Coverage**

Dear Paul:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the "Former Directors")—who are each former directors of Sears Canada, Inc. ("SCI")—regarding the above-referenced matter. For the reasons explained below, the Former Directors hereby demand excess DIC Drop-Down coverage under section 4(b)(i) of the Difference in Conditions ("DIC") Endorsement to Policy No. FD1581481 (the "2015 Lloyd's Policy"), issued by Certain Underwriters at Lloyd's of London ("Lloyd's"), upon exhaustion of the underlying primary coverage limits for the noticed claims described below.

The Former Directors previously gave notice of claims (the "Noticed Claims")¹ under numerous A-Side Management Liability Policies issued to Sears Holding Corp. ("SHC") as named insured, for policy periods including the period May 15, 2015 to May 15, 2016 (the "2015-16 policy period"). The noticed policies for the 2015-16 policy period include (i) primary Policy No. ELU139030-15 (the "2015 XL Policy") issued by XL Specialty Insurance Company ("XL"); (ii) Policy No. QPL0045025 (the "2015 QBE Policy") issued by QBE Insurance Corp. ("QBE"), providing \$15 million in coverage limits excess of \$15 million in loss; and (iii) the 2015 Lloyd's Policy, providing \$15 million in coverage limits excess of \$30 million in loss.

¹ The Noticed Claims comprise all claims as made in (i) the proofs of claim filed in the ongoing proceedings concerning SCI in Canada under the *Companies' Creditors Arrangement Act* (the "CCAA Proceedings") and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including but not limited to the continuation of a proposed class action commenced against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario bearing Court File Number 4114/15, in which the plaintiff is 1291079 Ontario Limited (the "129 Ontario Action").

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Paul T. Curley
June 17, 2019
Page 2

Background

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), XL agreed, *inter alia*, to provide coverage under the primary 2015 XL Policy for the Former Directors’ Defense Expenses in connection with the Noticed Claims. *See* Ex. 1 (attached), at 3-4. XL has since reimbursed substantial amounts of such Defense Expenses under the 2015 XL Policy. Based on our understanding as to the current impairment of the 2015 XL Policy and underlying defense counsel’s projected activity, we anticipate that the 2015 XL Policy limits will be exhausted within the next few months or earlier.

As you are aware, the Former Directors have, through counsel, provided regular detailed updates to XL and its excess insurers, including QBE and Lloyd’s, regarding the progress of the CCAA Proceedings and other related litigation. In addition, as the anticipated exhaustion of the 2015 XL Policy approached, the Former Directors made repeated requests to QBE to confirm that their ongoing Defense Expenses would be seamlessly reimbursed under the 2015 QBE Policy upon exhaustion of the 2015 XL Policy. QBE failed to respond until May 16, 2019, when its counsel sent the Former Directors a letter (the “QBE Denial Letter”) denying coverage under the 2015 QBE Policy. *See* Ex. 2 (attached).

The QBE Denial Letter further advised that QBE intended to “fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage.” *Id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 3 (attached). This motion is currently scheduled to be heard by the Bankruptcy Court in New York on June 20, 2019.

Excess DIC Drop-Down Coverage Under the 2015 Lloyd’s Policy

Pursuant to the Clause I amendatory endorsement to the 2015 Lloyd’s Policy, that policy follows form to the 2015 XL Policy. Further, section 4(b)(i) of the DIC Endorsement to the 2015 Lloyd’s Policy states that, “if and to the extent an insurer of any Underlying DIC Insurance (i) refuses to pay loss otherwise covered hereunder within sixty (60) days after such loss is due and payable . . . this Policy shall drop down with respect to such loss, subject to this Policy remaining excess of any Underlying DIC Insurance which pays such loss.”

The QBE Policy provides first-layer excess coverage attaching immediately above the limits of the 2015 XL Policy, and up to the attachment point of the 2015 Lloyd’s Policy. Other than the 2015 XL Policy and the 2015 QBE Policy, there is no source of Underlying DIC Insurance available to the Former Directors for the coverage provided by the 2015 Lloyd’s Policy. Accordingly, to the extent that QBE refuses to pay loss otherwise covered under the 2015 Lloyd’s Policy, the 2015 Lloyd’s Policy must drop down and provide coverage to the Former Directors for such loss.

As a follow-form excess policy, the 2015 Lloyd’s Policy provides coverage for the Noticed Claims on the same basis as set forth in the XL Coverage Letter. Among other things, XL determined that all of the Noticed Claims “constitute a single Claim under the 2015 to 2016 A-

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Paul T. Curley
 June 17, 2019
 Page 3

Side Policy,” because they satisfy the Interrelated Claims condition originating with an action (the “129 Ontario Action”) asserting Claims against certain Former Directors that was commenced in or about October 2015. *See* Ex. 1, at 3; *see also* 2015 XL Policy, § IV(G). XL made this determination even though it was well known at the time that the plaintiff, 1291079 Ontario Limited, had commenced an earlier action (the “2013 Action”) against SCI in July 2013, which did not name any individual as a defendant or include any allegations against any individual.

QBE’s Refusal to Pay Loss Covered Under the QBE Policy

The QBE Denial Letter contradicts XL’s coverage determination under the 2015 XL Policy by seizing upon a letter dated December 3, 2013, from Sotos LLP to the Former Directors, and contending that this letter constitutes an earlier “Claim” asserting Interrelated Wrongful Acts with the Noticed Claims. *See* Ex. 2, at 8. Although the QBE Denial Letter does not attach a copy of the letter on which QBE purports to rely, we attach here a copy of the December 2013 letter (which is found in the public record of the CCAA Proceedings) as Exhibit 4. Even as QBE describes its contents, however, this letter plainly does not satisfy the definition of a “Claim” under the 2015 XL Policy.

In acknowledging coverage under the 2015 XL Policy, XL correctly determined that the 2013 Action against SCI did *not* constitute a Claim under the terms of the 2015 XL Policy. Rather, the 2013 Action involved allegations by certain Sears Hometown store dealers that SCI had breached a Dealer Agreement between them, and related franchise claims. As of the date of the December 2013 letter, 129 Ontario had no legal claim of right against any of the Former Directors—a fact that QBE’s own description of the letter plainly reflects. The December 2013 letter did not allege that any Wrongful Act by the Former Directors had occurred. It also did not state or imply an actual, present intention to file a lawsuit or other proceeding. Nor did it assert a right to any legally cognizable claim to relief—either monetary or non-monetary—to which the Former Directors (or their insurance) could respond, defend, or settle. Rather, the letter invoked only a contingent future possibility based upon events that had not then occurred and might never have occurred.

QBE’s contention that the December 2013 letter constitutes a Claim under the 2015 XL Policy therefore has no basis in fact or law. *See, e.g., St. Paul Mercury Ins. Co. v. Foster*, 268 F. Supp. 2d 1035, 1047 (C.D. Ill. 2003) (even specific allusions to “the possibility of a lawsuit” and “efforts at intimidation by attorneys” are not claims under claims-made insurance policies because they “may never materialize into demands against any insurance policies”); *Cent. Illinois Pub. Serv. Co. v. Am. Empire Surplus Lines Ins. Co.*, 267 Ill. App. 3d 1043, 1047 (Ill. App. 1994) (a “claim” must be an “actual demand for something” that is presently “due or believed to be due”).

Accordingly, because QBE has “refused to pay loss otherwise covered” under the 2015 Lloyd’s Policy, the 2015 Lloyd’s Policy must drop down and pay such otherwise covered loss unless QBE satisfies its coverage obligation “within sixty (60) days after such loss is due and payable.” In light of the QBE Denial Letter and QBE’s stated intention to file a lawsuit against the Former Directors, there is no reasonable expectation that QBE will pay such loss before this payment obligation under the 2015 Lloyd’s Policy is triggered.

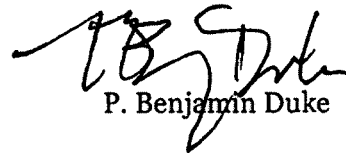
COVINGTON

Paul T. Curley
June 17, 2019
Page 4

* * *

In light of the above, the Former Directors request that Lloyd's promptly confirm that it will provide excess DIC Drop-Down coverage under section 4(b)(i) of the DIC Endorsement to the 2015 Lloyd's Policy, once the limits of the 2015 XL Policy have been exhausted. Please advise if you need any additional information concerning the above. The Former Directors reserve all of their rights, and waive none, with regard to the foregoing matters.

Yours sincerely,

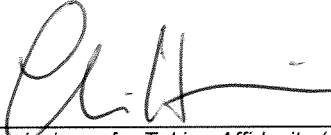


P. Benjamin Duke

Enclosures

cc: William Clark
Beazley Group

This is Exhibit "G" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6..., 2019

A handwritten signature in black ink, appearing to be "P. H.", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
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New York, NY 10018-1405
T +1 212 841 1000

By Electronic Mail

June 7, 2019

Tammy Yuen, Esq.
Skarzynski Black LLC
One Battery Park Plaza, 32nd Floor
New York, New York 10004

Re: *Sears Canada, Inc.*
Insured: Sears Holdings Corporation
Insurer: XL Specialty Insurance Company
XL Ref. No.: 0004070548
SB File No.: 21995

Dear Tammy:

We write on behalf of certain former directors (“Former Directors”) of Sears Canada, Inc. (“SCI”) regarding the enclosed letter (the “QBE Denial Letter”) dated May 16, 2019, from counsel for QBE Insurance Corp., denying coverage of the Former Directors under Policy No. QPL0045025 (the “2015 QBE Policy”) for the above-referenced claim. A copy of the QBE Denial Letter is attached hereto as Exhibit 1.

The QBE Policy provides excess coverage and follows form to Policy No. ELU139030-15 (the “2015 XL Policy”) issued by XL Specialty Insurance Company (“XL”) to Sears Holdings Corp. as named insured, for the period May 15, 2015 to May 15, 2016. As you know, the Former Directors previously gave XL notice of claims (the “Noticed Claims”) made in (i) the proofs of claim filed in the ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (the “CCAA Proceedings”) and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including but not limited to the continuation of a proposed class action commenced against ESL Investments Inc., and certain of the Former Directors (namely, Messrs. Crowley, Harker, Ross, Bird, McBurney, and Campbell) in the Ontario Superior Court of Justice, at Milton, Ontario bearing Court File Number 4114/15, in which the plaintiff is 1291079 Ontario Limited (the “129 Ontario Action”). XL thereafter agreed, *inter alia*, to provide coverage for Defense Expenses under the 2015 XL Policy and has reimbursed substantial amounts of such Defense Expenses under that policy to date.

Following extensive analysis and correspondence concerning the Noticed Claims, XL issued a coverage letter dated Oct. 23, 2018, which determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” as all are Interrelated Claims relating to the Claim first made in the 129 Ontario Action filed in 2015. *See Ex. 2* (attached), at 3. The QBE Denial Letter contradicts that determination by contending that an alleged letter dated December 3, 2013, from Sotos LLP to the Former Directors, constitutes an earlier Interrelated

COVINGTON

Tammy Yuen, Esq.
June 7, 2019
Page 2

Claim under the 2015 XL Policy. *See* Ex. 1, at 8. The QBE Denial Letter asserts that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under A-Side policies insuring the Former Directors for the 2013–14 policy period.

The letter further advises that QBE intends to “fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage.” *Id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 3 (attached). This motion is currently scheduled to be heard by the Bankruptcy Court in New York on June 20, 2019.

The QBE Denial Letter failed to attach a copy of the alleged December 3, 2013 letter on which QBE purported to rely. Nevertheless, the December 2013 letter even as QBE describes it plainly does not constitute a Claim as defined in the 2015 XL Policy. Among other things, it did not allege actual wrongdoing by the Former Directors, did not assert any legally cognizable claim of right to monetary or non-monetary relief, and was contingent on the possibility of events happening in the future which had not occurred at the time. The Former Directors expect to proceed accordingly in response to QBE’s actions.

In light of QBE’s position, however, we note that XL also provided primary A-Side coverage in the 2013–14 period, pursuant to primary policy No. ELU129612-13 (the “2013 XL Policy”) issued to Sears Holdings Corp. as named insured for the period May 1, 2013 to May 1, 2014. In the event that QBE (and/or other insurers) obtains a judicial declaration that the Noticed Claims relate to another Claim first made in the 2013–14 policy period, XL will be responsible for covering all such Interrelated Claims under the 2013 XL Policy, and all payments made pursuant to the 2015 XL Policy must then be applied to exhaustion of the limits of the 2013 XL Policy. This letter serves to advise XL of the foregoing contingency which has resulted from QBE’s unanticipated wrongful denial of coverage of the Former Directors under the 2015 QBE Policy.

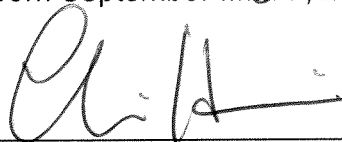
The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,


P. Benjamin Duke

Enclosures

This is Exhibit "H" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019

A handwritten signature in black ink, appearing to be 'A. H.', written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: eclaims@enhinsurance.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: Endurance Policy No. ADX10003943100; Canadian CCAA proceedings regarding Sears Canada in the Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL)
Date: Friday, June 21, 2019 8:52:16 PM
Attachments: [2019.06.21 - Ltr from B. Duke re Endurance No. ADX10003943100.pdf](#)
[Ex. 1 - Issued Statement of Claim - Morneau Shepell.pdf](#)
[Ex. 2 - Issued Statement of Claim - FTI - TUV.pdf](#)
[Ex. 3 - Issued Statement of Claim - Lit Trustee.pdf](#)
[Ex. 4 - Fresh as Amended Statement of Claim amended April 9 2019.pdf](#)
[Ex. 5 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 6 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 7 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 8 - OBE Motion for Relief.pdf](#)
[Ex. 9 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Dear Claims Manager,

Please see the attached notice letter with supporting documents for this matter. Please acknowledge receipt of this email.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1071 | ahahn@cov.com
www.cov.com



COVINGTON

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 SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
 The New York Times Building
 620 Eighth Avenue
 New York, NY 10018-1405
 T +1 212 841 1000

By Electronic Mail and FedEx

June 21, 2019

Endurance American Insurance Co.
 Attn: Claims Department
 333 Westchester Ave., West Avenue
 White Plains, NY 10604
eclaims@enhinsurance.com

**Re: Endurance American Ins. Co. Policy No. ADX10003943100;
 Canadian CCAA Proceedings Regarding Sears Canada, Inc. in the
 Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL)**

To whom it may concern:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada, Inc. (“SCI”)—in connection with their claims for coverage under certain A-Side Management Liability policies (“D&O Policies”) issued to Sears Holdings Corp. (“SHC”), for claims made against them in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15) (collectively, the “Noticed Claims”). We enclose with this letter copies of the operative pleadings for the Noticed Claims that currently are being prosecuted. *See Exs. 1–4.*

In March 2018, the Former Directors gave notice of the above claims to each of the primary and excess insurance carriers that issued D&O Policies to SHC or to SCI for the period covering 2017 to 2018. The Former Directors sought, *inter alia*, coverage for and immediate reimbursement of Defense Expenses already incurred, and continuing to be incurred, in defense of the Noticed Claims under the two primary D&O Policies issued by XL Specialty Insurance Company (“XL”) for this period: (1) Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the “2016 XL SCI Policy”), and (2) Policy No. ELU149912-17 issued to SHC as named insured for the period May 15, 2017 to May 15, 2018 (the “2017 XL SHC Policy”).

By letter dated October 23, 2018, XL advised that, based upon its investigation, the Noticed Claims “constitute a single Claim” under earlier primary D&O Policy No. ELU139030-15 (the “2015 XL Policy”) issued by XL to SHC as named insured for the period May 15, 2015 to

COVINGTON

June 21, 2019
Page 2

May 15, 2016 (the “2015–16 policy period”), on the ground that the Noticed Claims satisfied the “Interrelated Claims” condition in the 2015 XL Policy originating with the 129 Ontario Action, which was commenced in or about October 2015. *See* Ex. 5 (attached), at 3. In that letter, XL also agreed, *inter alia*, to reimburse the Former Directors’ Defense Expenses for the Noticed Claims, subject to a reservation of rights.¹ XL has since reimbursed the Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Promptly after learning of XL’s coverage determination under the 2015 XL Policy, the Former Directors provided additional notice of the Noticed Claims to the insurance carriers that issued excess D&O Policies to SHC as named insured for the 2015–16 policy period. The Former Directors have been providing regular updates regarding the CCAA Proceedings and the Noticed Claims to these insurers since November 2018. Prior to May 2019, no carrier had indicated any objection to or disagreement with XL’s coverage determination under the 2015 XL Policy or XL’s reimbursement of the Former Directors’ Defense Expenses under that policy.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel’s projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation (“QBE”) provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the “2015 QBE Policy”), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors’ Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the “QBE Denial Letter”), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL’s seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 6. The QBE Denial Letter identifies a letter dated December 3, 2013 (the “2013 Letter,” attached here as Exhibit 7), from Sotos LLP to the Former Directors, and contends that the 2013 Letter constitutes an earlier “Claim” alleging Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to “fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage.” *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for

¹ XL separately acknowledged coverage under the 2016 XL SCI Policy, but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

June 21, 2019
Page 3

purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 8 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims is provided under the D&O Policies issued to SHC as named insured for the 2015–16 policy period, including the 2015 XL Policy and the 2015 QBE Policy. *See* Ex. 9 (attached). However, in light of QBE's stated position and its consequent breach of the 2015 QBE Policy, the Former Directors have advised XL that, should the Noticed Claims be held to arise from Interrelated Wrongful Acts alleged in a Claim first made in the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"), XL would be obligated to provide coverage for the Noticed Claims under XL primary Policy No. ELU129612-13 (the "2013 XL Policy") issued to SHC as named insured for the 2013–14 policy period, and all payments made pursuant to the 2015 XL Policy must be applied to exhaustion of the limits of the 2013 XL Policy.

In light of the above, the Former Directors hereby provide Endurance American Insurance Company ("Endurance") with the same conditional notice and demand for coverage under Policy No. ADX10003943100 (the "2013 Endurance Policy") issued by Endurance to SHC as named insured for the 2013–14 policy period, in the event that QBE (and/or other insurers) obtains a judicial or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, and subject only to the attachment point and limits of the 2013 Endurance Policy.

* * *

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss this matter further.

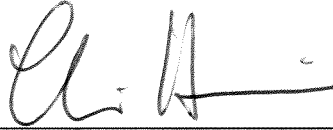
Sincerely,



P. Benjamin Duke

Enclosures

This is Exhibit "I" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019



Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: crumandforsternol@cfins.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: North River Policy No. 556-008922-8; Canadian CCAA proceedings regarding Sears Canada in the Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL)
Date: Friday, June 21, 2019 8:53:36 PM
Attachments: [2019.06.21 - Ltr from B. Duke re North River No. 556-008922-8.pdf](#)
[Ex. 1 - Issued Statement of Claim - Morneau Shepell.pdf](#)
[Ex. 2 - Issued Statement of Claim - FTI - TUV.pdf](#)
[Ex. 3 - Issued Statement of Claim - Lit Trustee.pdf](#)
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[Ex. 7 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 8 - QBE Motion for Relief.pdf](#)
[Ex. 9 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Dear Claims Manager,

Please see the attached notice letter with supporting documents for this matter. Please acknowledge receipt of this email.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
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T +1 212 841 1071 | ahahn@cov.com
www.cov.com

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 New York, NY 10018-1405
 T +1 212 841 1000

By Electronic Mail and FedEx

June 21, 2019

Crum & Forster
 Claims Department
 305 Madison Avenue
 Morristown, NJ 07962
crumandforsternol@cfins.com

**Re: North River Insurance Co. Policy No. 556-008922-8;
 Canadian CCAA Proceedings Regarding Sears Canada, Inc. in the
 Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL)**

To whom it may concern:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada, Inc. (“SCI”)—in connection with their claims for coverage under certain A-Side Management Liability policies (“D&O Policies”) issued to Sears Holdings Corp. (“SHC”), for claims made against them in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15) (collectively, the “Noticed Claims”). We enclose with this letter copies of the operative pleadings for the Noticed Claims that currently are being prosecuted. *See Exs. 1–4.*

In March 2018, the Former Directors gave notice of the above claims to each of the primary and excess insurance carriers that issued D&O Policies to SHC or to SCI for the period covering 2017 to 2018. The Former Directors sought, *inter alia*, coverage for and immediate reimbursement of Defense Expenses already incurred, and continuing to be incurred, in defense of the Noticed Claims under the two primary D&O Policies issued by XL Specialty Insurance Company (“XL”) for this period: (1) Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the “2016 XL SCI Policy”), and (2) Policy No. ELU149912-17 issued to SHC as named insured for the period May 15, 2017 to May 15, 2018 (the “2017 XL SHC Policy”).

By letter dated October 23, 2018, XL advised that, based upon its investigation, the Noticed Claims “constitute a single Claim” under earlier primary D&O Policy No. ELU139030-15 (the “2015 XL Policy”) issued by XL to SHC as named insured for the period May 15, 2015 to

COVINGTON

June 21, 2019
Page 2

May 15, 2016 (the “2015–16 policy period”), on the ground that the Noticed Claims satisfied the “Interrelated Claims” condition in the 2015 XL Policy originating with the 129 Ontario Action, which was commenced in or about October 2015. *See* Ex. 5 (attached), at 3. In that letter, XL also agreed, *inter alia*, to reimburse the Former Directors’ Defense Expenses for the Noticed Claims, subject to a reservation of rights.¹ XL has since reimbursed the Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Promptly after learning of XL’s coverage determination under the 2015 XL Policy, the Former Directors provided additional notice of the Noticed Claims to the insurance carriers that issued excess D&O Policies to SHC as named insured for the 2015–16 policy period. The Former Directors have been providing regular updates regarding the CCAA Proceedings and the Noticed Claims to these insurers since November 2018. Prior to May 2019, no carrier had indicated any objection to or disagreement with XL’s coverage determination under the 2015 XL Policy or XL’s reimbursement of the Former Directors’ Defense Expenses under that policy.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel’s projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation (“QBE”) provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the “2015 QBE Policy”), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors’ Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the “QBE Denial Letter”), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL’s seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 6. The QBE Denial Letter identifies a letter dated December 3, 2013 (the “2013 Letter,” attached here as Exhibit 7), from Sotos LLP to the Former Directors, and contends that the 2013 Letter constitutes an earlier “Claim” alleging Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to “fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage.” *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for

¹ XL separately acknowledged coverage under the 2016 XL SCI Policy, but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

June 21, 2019
Page 3

purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 8 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims is provided under the D&O Policies issued to SHC as named insured for the 2015–16 policy period, including the 2015 XL Policy and the 2015 QBE Policy. *See* Ex. 9 (attached). However, in light of QBE's stated position and its consequent breach of the 2015 QBE Policy, the Former Directors have advised XL that, should the Noticed Claims be held to arise from Interrelated Wrongful Acts alleged in a Claim first made in the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"), XL would be obligated to provide coverage for the Noticed Claims under XL primary Policy No. ELU129612-13 (the "2013 XL Policy") issued to SHC as named insured for the 2013–14 policy period, and all payments made pursuant to the 2015 XL Policy must be applied to exhaustion of the limits of the 2013 XL Policy.

In light of the above, the Former Directors hereby provide North River Insurance Company ("North River") with the same conditional notice and demand for coverage under Policy No. 556-008922-8 (the "2013 North River Policy") issued by North River to SHC as named insured for the 2013–14 policy period, in the event that QBE (and/or other insurers) obtains a judicial or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, and subject only to the attachment point and limits of the 2013 North River Policy.

* * *

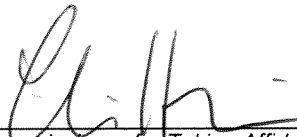
The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss this matter further.

Sincerely,

 ALW H
P. Benjamin Duke

Enclosures

This is Exhibit "J" referred to in the Affidavit of Donald
Campbell Ross sworn September⁶....., 2019

A handwritten signature in black ink, appearing to be "D. H. Ross", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: claims@berkleypro.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: Berkley Policy No. 18007582; Canadian CCAA proceedings regarding Sears Canada in the Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL)
Date: Friday, June 21, 2019 8:53:05 PM
Attachments: [2019.06.21 - Ltr from B. Duke re Berkley No. 18007582.pdf](#)
[Ex. 1 - Issued Statement of Claim - Morneau Shepell.pdf](#)
[Ex. 2 - Issued Statement of Claim - FTI - TUV.pdf](#)
[Ex. 3 - Issued Statement of Claim - Lit Trustee.pdf](#)
[Ex. 4 - Fresh as Amended Statement of Claim amended April 9 2019.pdf](#)
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[Ex. 7 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 8 - QBE Motion for Relief.pdf](#)
[Ex. 9 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Dear Claims Manager,

Please see the attached notice letter with supporting documents for this matter. Please acknowledge receipt of this email.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
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www.cov.com



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By Electronic Mail and FedEx

June 21, 2019

Berkley Professional Liability
Berkley Professional Liability Claims,
c/o Claims Department
14 Wall Street
Suite 1610
New York, NY 10005
claims@berkleypro.com

**Re: Berkley Insurance Co. Policy No. 18007582;
Canadian CCAA Proceedings Regarding Sears Canada, Inc. in the
Ontario Superior Court of Justice (Court File No. CV-17-11846-00CL)**

To whom it may concern:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada, Inc. (“SCI”)—in connection with their claims for coverage under certain A-Side Management Liability policies (“D&O Policies”) issued to Sears Holdings Corp. (“SHC”), for claims made against them in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15) (collectively, the “Noticed Claims”). We enclose with this letter copies of the operative pleadings for the Noticed Claims that currently are being prosecuted. *See* Exs. 1–4.

In March 2018, the Former Directors gave notice of the above claims to each of the primary and excess insurance carriers that issued D&O Policies to SHC or to SCI for the period covering 2017 to 2018. The Former Directors sought, *inter alia*, coverage for and immediate reimbursement of Defense Expenses already incurred, and continuing to be incurred, in defense of the Noticed Claims under the two primary D&O Policies issued by XL Specialty Insurance Company (“XL”) for this period: (1) Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the “2016 XL SCI Policy”), and (2) Policy No. ELU149912-17 issued to SHC as named insured for the period May 15, 2017 to May 15, 2018 (the “2017 XL SHC Policy”).

COVINGTON

June 21, 2019

Page 2

By letter dated October 23, 2018, XL advised that, based upon its investigation, the Noticed Claims “constitute a single Claim” under earlier primary D&O Policy No. ELU139030-15 (the “2015 XL Policy”) issued by XL to SHC as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), on the ground that the Noticed Claims satisfied the “Interrelated Claims” condition in the 2015 XL Policy originating with the 129 Ontario Action, which was commenced in or about October 2015. *See* Ex. 5 (attached), at 3. In that letter, XL also agreed, *inter alia*, to reimburse the Former Directors’ Defense Expenses for the Noticed Claims, subject to a reservation of rights.¹ XL has since reimbursed the Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Promptly after learning of XL’s coverage determination under the 2015 XL Policy, the Former Directors provided additional notice of the Noticed Claims to the insurance carriers that issued excess D&O Policies to SHC as named insured for the 2015–16 policy period. The Former Directors have been providing regular updates regarding the CCAA Proceedings and the Noticed Claims to these insurers since November 2018. Prior to May 2019, no carrier had indicated any objection to or disagreement with XL’s coverage determination under the 2015 XL Policy or XL’s reimbursement of the Former Directors’ Defense Expenses under that policy.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel’s projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation (“QBE”) provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the “2015 QBE Policy”), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors’ Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the “QBE Denial Letter”), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL’s seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 6. The QBE Denial Letter identifies a letter dated December 3, 2013 (the “2013 Letter,” attached here as Exhibit 7), from Sotos LLP to the Former Directors, and contends that the 2013 Letter constitutes an earlier “Claim” alleging Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to “fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage.” *See id.* at 11. On or about May

¹ XL separately acknowledged coverage under the 2016 XL SCI Policy, but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

June 21, 2019
Page 3

16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 8 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims is provided under the D&O Policies issued to SHC as named insured for the 2015–16 policy period, including the 2015 XL Policy and the 2015 QBE Policy. *See* Ex. 9 (attached). However, in light of QBE's stated position and its consequent breach of the 2015 QBE Policy, the Former Directors have advised XL that, should the Noticed Claims be held to arise from Interrelated Wrongful Acts alleged in a Claim first made in the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"), XL would be obligated to provide coverage for the Noticed Claims under XL primary Policy No. ELU129612-13 (the "2013 XL Policy") issued to SHC as named insured for the 2013–14 policy period, and all payments made pursuant to the 2015 XL Policy must be applied to exhaustion of the limits of the 2013 XL Policy.

In light of the above, the Former Directors hereby provide Berkley Insurance Company ("Berkley") with the same conditional notice and demand for coverage under Policy No. 18007582 (the "2013 Berkley Policy") issued by Berkley to SHC as named insured for the 2013–14 policy period, in the event that QBE (and/or other insurers) obtains a judicial or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, and subject only to the attachment point and limits of the 2013 Berkley Policy.

* * *

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss this matter further.


Sincerely,



P. Benjamin Duke

Enclosures

This is Exhibit "K" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6....., 2019

A handwritten signature in black ink, appearing to be 'A.H.', written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: wbila@wwmlawyers.com; Eugene.Roymisher@axiscapital.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: CCAA proceedings regarding Sears Canada, Inc.; AXIS Policies Issued to SHC
Date: Friday, June 21, 2019 8:42:54 PM
Attachments: [2019.06.21 - Ltr from B. Duke to W. Bila \(AXIS\).pdf](#)
[Ex. 1 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 2 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 3 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 4 - OBE Motion for Relief.pdf](#)
[Ex. 5 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Bill,

Please see the attached letter and enclosures.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1071 | ahahn@cov.com
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T +1 212 841 1000

By Electronic Mail

June 21, 2019

William P. Bila
Walker Wilcox Matousek LLP
One North Franklin
Suite 3200
Chicago, IL 60606-3610
E: wbila@wwmlawyers.com

Re: Insurer: AXIS Insurance Company
Insured: Sears Holdings Corporation
Policy: D&O
Policy No.: MCN738227/01/2015
Claimant: 1291079 Ontario Limited Action (John Solak, et al)
Claim No.: BH 112666

Dear Bill:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada Inc. (“SCI”)—regarding the above-referenced matter.

The Former Directors previously gave Axis Insurance Company (“Axis”) notice of claims (collectively, the “Noticed Claims”) under Policy No. MCN738227/01/2015 issued by Axis to Sears Holdings Corp. (“SHC”) as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), comprising all claims made in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15).

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), primary insurer XL Specialty Insurance Company (“XL”) agreed, *inter alia*, to provide coverage of the Former Directors’ Defense Expenses in connection with the Noticed Claims under primary policy No. ELU139030-15 (the “2015 XL Policy”), issued by XL to SHC for the 2015–16 policy period. XL determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” because they satisfy the Interrelated Claims condition originating with the 129 Ontario Action, which was

COVINGTON

William P. Bila
June 21, 2019
Page 2

commenced in or about October 2015. *See* Ex. 1 (attached), at 3.¹ XL has since reimbursed Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel's projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation ("QBE") provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the "2015 QBE Policy"), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors' Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the "QBE Denial Letter"), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL's seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 2. The QBE Denial Letter contradicts XL's prior determination by contending that a letter dated December 3, 2013 (the "2013 Letter", attached here as Exhibit 3), from Sotos LLP to the Former Directors, constitutes an earlier "Claim" asserting Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to "fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage." *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 4 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims exists and should continue to be paid under the D&O Policies for the 2015–16 policy period. *See* Ex. 5 (attached). In light of QBE's position, however, we note that Axis issued D&O Policy No. MCN738227/01/2013 (the "2013 Axis Policy") to SHC as named insured for the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"). The Former Directors hereby give conditional notice that, in the event QBE (and/or other insurers) obtains a judicial declaration or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, Axis will be

¹ XL separately acknowledged coverage under Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the "2016 XL SCI Policy"), but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

William P. Bila
June 21, 2019
Page 3

responsible for covering all such Claims under the 2013 Axis Policy, subject only to the attachment point and limits of that policy.

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,

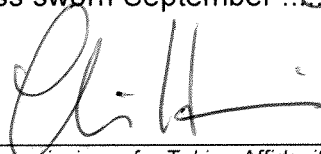
A handwritten signature in black ink, appearing to read "PBD / AWH". The signature is written in a cursive, somewhat stylized font.

P. Benjamin Duke

Enclosures

cc: Eugene Roymisher (by email)
AXIS Professional Lines

This is Exhibit "L" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019



Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: maurice.pesso@kennedyscmk.com; Joseph.Girdusky@awac.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: CCAA proceedings regarding Sears Canada, Inc.; AWAC Policies Issued to SHC
Date: Friday, June 21, 2019 8:49:34 PM
Attachments: [2019_06.21 - Ltr from B. Duke to M. Pessa \(AWAC\).pdf](#)
[Ex. 1 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 2 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 3 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 4 - OBE Motion for Relief.pdf](#)
[Ex. 5 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Maurice,

Please see the attached letter and enclosures.

Regards,

Andrew

Andrew Hahn

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New York, NY 10018-1405
T +1 212 841 1000

By Electronic Mail

June 21, 2019

Maurice Pessa
Kennedys CMK
570 Lexington Ave 8th Floor
New York, NY 10022
maurice.pessa@kennedyscmk.com

Re: Insured: Sears Holdings Corporation
Matter: Sears Canada / 129 Ontario Action
Claim No.: 2018020496

Dear Maurice:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada Inc. (“SCI”)—regarding the above-referenced matter.

The Former Directors previously gave Allied World National Assurance Company (“Allied World”) notice of claims (collectively, the “Noticed Claims”) under Policy No. 0308-3251 issued by Allied World to Sears Holdings Corp. (“SHC”) as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), comprising all claims made in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15).

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), primary insurer XL Specialty Insurance Company (“XL”) agreed, *inter alia*, to provide coverage of the Former Directors’ Defense Expenses in connection with the Noticed Claims under primary policy No. ELU139030-15 (the “2015 XL Policy”), issued by XL to SHC for the 2015–16 policy period. XL determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” because they satisfy the Interrelated Claims condition originating with the 129 Ontario Action, which was

COVINGTON

Maurice Pesso
June 21, 2019
Page 2

commenced in or about October 2015. *See* Ex. 1 (attached), at 3.¹ XL has since reimbursed Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel's projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation ("QBE") provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the "2015 QBE Policy"), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors' Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the "QBE Denial Letter"), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL's seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 2. The QBE Denial Letter contradicts XL's prior determination by contending that a letter dated December 3, 2013 (the "2013 Letter", attached here as Exhibit 3), from Sotos LLP to the Former Directors, constitutes an earlier "Claim" asserting Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to "fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage." *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 4 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims exists and should continue to be paid under the D&O Policies for the 2015–16 policy period. *See* Ex. 5 (attached). In light of QBE's position, however, we note that Allied World issued D&O Policy No. 0308-3251 (the "2013 Allied World Policy") to SHC as named insured for the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"). The Former Directors hereby give conditional notice that, in the event QBE (and/or other insurers) obtains a judicial declaration or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, Allied World will be

¹ XL separately acknowledged coverage under Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the "2016 XL SCI Policy"), but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

Maurice Pesso
June 21, 2019
Page 3

responsible for covering all such Claims under the 2013 Allied World Policy, subject only to the attachment point and limits of that policy.

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,

A handwritten signature in black ink, appearing to read "PBJD / AWH".

P. Benjamin Duke

Enclosures

cc: Joseph Girdusky (by email)
Allied World Assurance Company

This is Exhibit "M" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019



Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: tgeyer@baileycav.com; Brian.Baney@aspen-insurance.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: CCAA proceedings regarding Sears Canada, Inc.; Aspen Policies Issued to SHC
Date: Friday, June 21, 2019 8:44:46 PM
Attachments: [2019.06.21 - Ltr from B. Duke to T. Geyer \(Aspen\).pdf](#)
[Ex. 1 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 2 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 3 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 4 - OBE Motion for Relief.pdf](#)
[Ex. 5 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Tom,

Please see the attached letter and enclosures.

Regards,

Andrew

Andrew Hahn

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The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
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 620 Eighth Avenue
 New York, NY 10018-1405
 T +1 212 841 1000

By Electronic Mail

June 21, 2019

Thomas Geyer
 Bailey Cavaliere LLC
 10 W. Broad Street, Ste. 2100
 Columbus, OH 43215-3422
 E: tgeyer@baileycav.com

Re: Insured: Sears Holdings Corporation
Insurer: Aspen American Insurance Company
Policy No: MCAA1K415
Matter: 129 Ontario Action
File No.: MC1570037298

Dear Tom:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada Inc. (“SCI”)—regarding the above-referenced matter.

The Former Directors previously gave Aspen American Insurance Company (“Aspen”) notice of claims (collectively, the “Noticed Claims”) under Policy No. MCAA1K415 issued by Aspen to Sears Holdings Corp. (“SHC”) as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), comprising all claims made in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15).

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), primary insurer XL Specialty Insurance Company (“XL”) agreed, *inter alia*, to provide coverage of the Former Directors’ Defense Expenses in connection with the Noticed Claims under primary policy No. ELU139030-15 (the “2015 XL Policy”), issued by XL to SHC for the 2015–16 policy period. XL determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” because they satisfy the Interrelated Claims condition originating with the 129 Ontario Action, which was

COVINGTON

Thomas Geyer
June 21, 2019
Page 2

commenced in or about October 2015. *See* Ex. 1 (attached), at 3.¹ XL has since reimbursed Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel's projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation ("QBE") provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the "2015 QBE Policy"), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors' Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the "QBE Denial Letter"), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL's seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 2. The QBE Denial Letter contradicts XL's prior determination by contending that a letter dated December 3, 2013 (the "2013 Letter", attached here as Exhibit 3), from Sotos LLP to the Former Directors, constitutes an earlier "Claim" asserting Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to "fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage." *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 4 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims exists and should continue to be paid under the D&O Policies for the 2015–16 policy period. *See* Ex. 5 (attached). In light of QBE's position, however, we note that Aspen issued D&O Policy No. MCAA1K413 (the "2013 Aspen Policy") to SHC as named insured for the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"). The Former Directors hereby give conditional notice that, in the event QBE (and/or other insurers) obtains a judicial declaration or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, Aspen will be responsible for

¹ XL separately acknowledged coverage under Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the "2016 XL SCI Policy"), but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

Thomas Geyer
June 21, 2019
Page 3

covering all such Claims under the 2013 Aspen Policy, subject only to the attachment point and limits of that policy.

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,

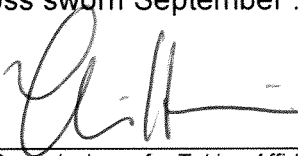
A handwritten signature in black ink, appearing to read "PB Duke / AWH". The signature is written in a cursive, somewhat stylized font.

P. Benjamin Duke

Enclosures

cc: Brian Baney (by email)
Aspen American Insurance Company

This is Exhibit "N" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6...., 2019

A handwritten signature in black ink, appearing to be "A. H.", written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: kieran.hughes@aig.com; richard.pokorny@aig.com; highexcessclaims@chartisinsurance.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: CCAA proceedings regarding Sears Canada, Inc.; AIG Policies Issued to SHC
Date: Friday, June 21, 2019 8:41:59 PM
Attachments: [2019.06.21 - Ltr from B. Duke to K. Hughes \(AIG\).pdf](#)
[Ex. 1 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 2 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 3 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 4 - OBE Motion for Relief.pdf](#)
[Ex. 5 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Kieran,

Please see the attached letter and enclosures.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1071 | ahahn@cov.com
www.cov.com



COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
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 The New York Times Building
 620 Eighth Avenue
 New York, NY 10018-1405
 T +1 212 841 1000

By Electronic Mail

June 21, 2019

Kieran Hughes
 AIG
 Financial Lines Claims
 P.O. Box 25947
 Shawnee Mission, KS 66225
 E: kieran.hughes@aig.com

Re: Insured: Sears Holdings Corp.
Claimant: 129 Ontario Action
Policy No. 01-310-13-60
Claim No.: 5029133196US

Dear Kieran:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada Inc. (“SCI”)—regarding the above-referenced matter.

The Former Directors previously gave AIG notice of claims (collectively, the “Noticed Claims”) under Policy Nos. 01-309-63-06 and 01-310-13-60 issued by Illinois National Insurance Company to Sears Holdings Corp. (“SHC”) as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), comprising all claims made in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15).

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), primary insurer XL Specialty Insurance Company (“XL”) agreed, *inter alia*, to provide coverage of the Former Directors’ Defense Expenses in connection with the Noticed Claims under primary policy No. ELU139030-15 (the “2015 XL Policy”), issued by XL to SHC for the 2015–16 policy period. XL determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” because they satisfy the Interrelated Claims condition originating with the 129 Ontario Action, which was

COVINGTON

Kieran Hughes
June 21, 2019
Page 2

commenced in or about October 2015. *See* Ex. 1 (attached), at 3.¹ XL has since reimbursed Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel's projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation ("QBE") provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the "2015 QBE Policy"), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors' Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the "QBE Denial Letter"), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL's seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 2. The QBE Denial Letter contradicts XL's prior determination by contending that a letter dated December 3, 2013 (the "2013 Letter", attached here as Exhibit 3), from Sotos LLP to the Former Directors, constitutes an earlier "Claim" asserting Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to "fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage." *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 4 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims exists and should continue to be paid under the D&O Policies for the 2015–16 policy period. *See* Ex. 5 (attached). In light of QBE's position, however, we note that Illinois National Insurance Co. issued D&O Policy No. 01-996-27-11 (the "2013 Illinois National Policy") to SHC as named insured for the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"), and New Hampshire Insurance Co. issued D&O Policy No. 39130635 (the "2013 New Hampshire Policy") to SHC as named insured for the 2013–14 policy period. The Former Directors hereby give conditional notice that, in the event QBE (and/or other insurers) obtains a judicial

¹ XL separately acknowledged coverage under Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the "2016 XL SCI Policy"), but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

Kieran Hughes
June 21, 2019
Page 3

declaration or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013-14 policy period, AIG will be responsible for covering all such Claims under the 2013 Illinois National Policy and the 2013 New Hampshire Policy, subject only to the attachment point and limits of those policies.

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Benjamin Duke" with a stylized flourish at the end.

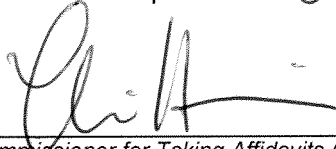
P. Benjamin Duke

Enclosures

cc: Richard Pokorny (by email)
AIG

highexcessclaims@chartisinsurance.com

This is Exhibit "O" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6....., 2019



Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: jwinkler@navg.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: CCAA proceedings regarding Sears Canada, Inc.; Navigators Policies Issued to SHC
Date: Friday, June 21, 2019 8:50:27 PM
Attachments: [2019.06.21 - Ltr from B. Duke to J. Winkler \(Navigators\).pdf](#)
[Ex. 1 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 2 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 3 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 4 - OBE Motion for Relief.pdf](#)
[Ex. 5 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Jim,

Please see the attached letter and enclosures.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1071 | ahahn@cov.com
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 The New York Times Building
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 New York, NY 10018-1405
 T +1 212 841 1000

By Electronic Mail

June 21, 2019

James Winkler
 Senior Claims Counsel
 Navigators Insurance Company
 One Penn Plaza
 32nd Floor
 New York, NY 10119
jwinkler@navg.com

Re: Insured: Sears Holdings Corp.
Matter: 129 Ontario Limited
Claim No.: DOL308488
Policy No.: CH15DOL586634IV

Dear Jim:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada Inc. (“SCI”)—regarding the above-referenced matter.

The Former Directors previously gave Navigators Insurance Company (“Navigators”) notice of claims (collectively, the “Noticed Claims”) under Policy No. CH15DOL586634IV issued by Navigators to Sears Holdings Corp. (“SHC”) as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), comprising all claims made in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15).

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), primary insurer XL Specialty Insurance Company (“XL”) agreed, *inter alia*, to provide coverage of the Former Directors’ Defense Expenses in connection with the Noticed Claims under primary policy No. ELU139030-15 (the “2015 XL Policy”), issued by XL to SHC for the 2015–16 policy period. XL determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” because they satisfy the Interrelated Claims condition originating with the 129 Ontario Action, which was

COVINGTON

James Winkler
June 21, 2019
Page 2

commenced in or about October 2015. *See* Ex. 1 (attached), at 3.¹ XL has since reimbursed Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel's projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation ("QBE") provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the "2015 QBE Policy"), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors' Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the "QBE Denial Letter"), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL's seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 2. The QBE Denial Letter contradicts XL's prior determination by contending that a letter dated December 3, 2013 (the "2013 Letter", attached here as Exhibit 3), from Sotos LLP to the Former Directors, constitutes an earlier "Claim" asserting Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to "fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage." *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 4 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims exists and should continue to be paid under the D&O Policies for the 2015–16 policy period. *See* Ex. 5 (attached). In light of QBE's position, however, we note that Navigators issued D&O Policy No. CH13DOL586634IV (the "2013 Navigators Policy") to SHC as named insured for the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"). The Former Directors hereby give conditional notice that, in the event QBE (and/or other insurers) obtains a judicial declaration or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, Navigators will be

¹ XL separately acknowledged coverage under Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the "2016 XL SCI Policy"), but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

James Winkler
June 21, 2019
Page 3

responsible for covering all such Claims under the 2013 Navigators Policy, subject only to the attachment point and limits of that policy.

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Benjamin Duke" with a stylized flourish at the end.

P. Benjamin Duke

Enclosures

This is Exhibit "P" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019

A handwritten signature in black ink, appearing to be 'A. H.', written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: pcurley@kbrlaw.com; william.clarke@beazley.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: CCAA proceedings regarding Sears Canada, Inc.; Lloyd's Policies Issued to SHC
Date: Friday, June 21, 2019 8:43:51 PM
Attachments: [2019.06.21 - Ltr from B. Duke to P. Curley \(Lloyd's\).pdf](#)
[Ex. 1 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 2 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 3 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 4 - OBE Motion for Relief.pdf](#)
[Ex. 5 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Paul,

Please see the attached letter and enclosures.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
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New York, NY 10018-1405
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 New York, NY 10018-1405
 T +1 212 841 1000

By Electronic Mail

June 21, 2019

Paul T. Curley
 Kaufman Borgeest & Ryan LLP
 200 Summit Lake Drive
 Valhalla, New York 10595
 E: pcurley@kbrlaw.com

**Re: Lloyd's Policy Nos. FD1581481 & FD1380135
 CCAA Proceedings Regarding Sears Canada, Inc.**

Dear Paul:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada Inc. (“SCI”)—regarding the above-referenced matter.

The Former Directors previously gave certain Underwriters at Lloyd’s, London (“Lloyd’s”) notice of claims (collectively, the “Noticed Claims”) under Policy No. FD1581481 issued by Lloyd’s to Sears Holdings Corp. (“SHC”) as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), comprising all claims made in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies’ Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15).

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), primary insurer XL Specialty Insurance Company (“XL”) agreed, *inter alia*, to provide coverage of the Former Directors’ Defense Expenses in connection with the Noticed Claims under primary policy No. ELU139030-15 (the “2015 XL Policy”), issued by XL to SHC for the 2015–16 policy period. XL determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” because they satisfy the Interrelated Claims condition originating with the 129 Ontario Action, which was commenced in or about October 2015. *See* Ex. 1 (attached), at 3.¹ XL has since reimbursed

¹ XL separately acknowledged coverage under Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the “2016 XL SCI Policy”), but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

Paul T. Curley
June 21, 2019
Page 2

Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel's projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation ("QBE") provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the "2015 QBE Policy"), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors' Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the "QBE Denial Letter"), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL's seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 2. The QBE Denial Letter contradicts XL's prior determination by contending that a letter dated December 3, 2013 (the "2013 Letter", attached here as Exhibit 3), from Sotos LLP to the Former Directors, constitutes an earlier "Claim" asserting Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to "fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage." *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 4 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims exists and should continue to be paid under the D&O Policies for the 2015–16 policy period. *See* Ex. 5 (attached). In light of QBE's position, however, we note that Lloyd's issued D&O Policy No. FD1380135 (the "2013 Lloyd's Policy") to SHC as named insured for the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"). The Former Directors hereby give conditional notice that, in the event QBE (and/or other insurers) obtains a judicial declaration or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, Lloyd's will be responsible for covering all such Claims under the 2013 Lloyd's Policy, subject only to the attachment point and limits of that policy.

COVINGTON

Paul T. Curley
June 21, 2019
Page 3

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,

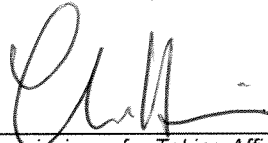
A handwritten signature in black ink, appearing to read "P. Benjamin Duke" with a stylized flourish at the end.

P. Benjamin Duke

Enclosures

cc: William Clark (by email)
Beazley Group

This is Exhibit "Q" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6...., 2019



Commissioner for Taking Affidavits (or as may be)

From: [Hahn, Andrew W](#)
To: sean.zimet@chubb.com; specialtyclaims@chubb.com
Cc: [Duke, Benjamin](#); [Luttinger, David A Jr.](#)
Subject: CCAA proceedings regarding Sears Canada, Inc.; Chubb Policies Issued to SHC
Date: Friday, June 21, 2019 8:45:45 PM
Attachments: [2019.06.21 - Ltr from B. Duke to S. Zimet \(Chubb\).pdf](#)
[Ex. 1 - Ltr from T. Yuen to C. Rosenberg \(10-23-2018\).pdf](#)
[Ex. 2 - Ltr from D. Wilford to Counsel for Former Directors \(5-16-2019\).pdf](#)
[Ex. 3 - Ltr from D. Sterns \(Sotos LLP\) \(12-03-2013\).pdf](#)
[Ex. 4 - QBE Motion for Relief.pdf](#)
[Ex. 5 - Ltr from B. Duke to D. Wilford \(6-17-2019\).pdf](#)
[image001.jpg](#)

Sean,

Please see the attached letter and enclosures.

Regards,

Andrew

Andrew Hahn

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1071 | ahahn@cov.com
www.cov.com



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BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1000

By Electronic Mail

June 21, 2019

Sean Zimet
Claims Associate
Chubb North American Claims
PO Box 5105
Scranton, PA 18505-0518
E: sean.zimet@chubb.com

Re: Insured: Sears Holding Corporation
Policy Type: Excess Directors' and Officers' Liability Side-A Coverage
Policy #: DOX G2759699A 001
Matter: 1291079 Ontario Limited
Claim #: KY18K2500212

Dear Sean:

We represent E.J. Bird, William Crowley, Douglas Campbell, William Harker, James McBurney, and Donald Ross (collectively, the “Former Directors”)—who are each former directors of Sears Canada Inc. (“SCI”)—regarding the above-referenced matter.

The Former Directors previously gave Chubb notice of claims (collectively, the “Noticed Claims”) under Policy No. G2759699A 001 issued by Westchester Fire Insurance Company to Sears Holdings Corp. (“SHC”) as named insured for the period May 15, 2015 to May 15, 2016 (the “2015–16 policy period”), comprising all claims made in: (i) the proofs of claim filed in ongoing proceedings concerning SCI in Canada under the *Companies' Creditors Arrangement Act* (Ontario Superior Court of Justice, Court File No. CV-17-11846-00CL) (the “CCAA Proceedings”), and (ii) litigation or other proceedings authorized by the Court overseeing the CCAA Proceedings, including the continuation of a proposed class action (the “129 Ontario Action”) by plaintiff 1291079 Ontario Limited against ESL Investments Inc., and the Former Directors in the Ontario Superior Court of Justice, at Milton, Ontario (Court File No. 4114/15).

By letter dated Oct. 23, 2018 (the “XL Coverage Letter”), primary insurer XL Specialty Insurance Company (“XL”) agreed, *inter alia*, to provide coverage of the Former Directors' Defense Expenses in connection with the Noticed Claims under primary policy No. ELU139030-15 (the “2015 XL Policy”), issued by XL to SHC for the 2015–16 policy period. XL determined that the Noticed Claims “constitute a single Claim under the [2015 XL Policy],” because they satisfy the Interrelated Claims condition originating with the 129 Ontario Action, which was

COVINGTON

Sean Zimet
June 21, 2019
Page 2

commenced in or about October 2015. *See* Ex. 1 (attached), at 3.¹ XL has since reimbursed Defense Expenses incurred by the Former Directors in connection with the Noticed Claims and continues to pay their ongoing Defense Expenses.

Based on our understanding of the impairment of the 2015 XL Policy and underlying defense counsel's projected activity, we anticipate that the 2015 XL Policy will be exhausted within the next few months or earlier. QBE Insurance Corporation ("QBE") provides first-layer excess coverage in the 2015–16 policy period under QBE Policy No. QPL0045025 (the "2015 QBE Policy"), which follows form to the 2015 XL Policy. Beginning in 2019, we repeatedly asked QBE to confirm its commitment to provide coverage under the 2015 QBE Policy, including continuous reimbursement of the Former Directors' Defense Expenses immediately upon the exhaustion of the 2015 XL Policy.

In response, QBE sent the attached letter dated May 16, 2019 (the "QBE Denial Letter"), denying coverage under the 2015 QBE Policy and advising for the first time that it would not follow XL's seven-months-old coverage determination under the primary 2015 XL Policy. *See* Ex. 2. The QBE Denial Letter contradicts XL's prior determination by contending that a letter dated December 3, 2013 (the "2013 Letter", attached here as Exhibit 3), from Sotos LLP to the Former Directors, constitutes an earlier "Claim" asserting Interrelated Wrongful Acts with the Noticed Claims. *See id.* at 8. The QBE Denial Letter further contends that the 2015 QBE Policy therefore does not respond to the Noticed Claims, and it suggests that coverage for the Noticed Claims may instead exist under D&O Policies insuring the Former Directors for claims made in or about December 2013. *See id.* at 11.

The QBE Denial Letter also advises that QBE intends to "fil[e] a judicial proceeding in the United States District Court for the Northern District of Illinois in which QBE will request a judicial declaration that it has no obligation to provide coverage." *See id.* at 11. On or about May 16, 2019, QBE filed a motion for relief from the automatic stay set forth in 11 U.S.C. § 362(d) for purposes of filing a declaratory judgment action against the Former Directors. *See* Ex. 4 (attached).

As stated in our letter to QBE dated June 17, 2019, the Former Directors believe that the position asserted in the QBE Denial Letter is without merit, and that coverage for the Noticed Claims exists and should continue to be paid under the D&O Policies for the 2015–16 policy period. *See* Ex. 5 (attached). In light of QBE's position, however, we note that Federal Insurance Company issued D&O Policy No. 6802-4184 (the "2013 Federal Policy") to SHC as named insured for the period May 1, 2013 to May 1, 2014 (the "2013–14 policy period"). The Former Directors hereby give conditional notice that, in the event QBE (and/or other insurers) obtains a judicial declaration or other binding declaration that the Noticed Claims arise from Interrelated Wrongful Acts alleged in a Claim first made in the 2013–14 policy period, Chubb

¹ XL separately acknowledged coverage under Policy No. ELU146443-16 issued to SCI as named insured for the period October 15, 2016 to February 12, 2018 (the "2016 XL SCI Policy"), but only with respect to certain of the Noticed Claims that are not currently being prosecuted in the CCAA Proceedings. We therefore do not address the 2016 XL SCI Policy further in this letter.

COVINGTON

Sean Zimet
June 21, 2019
Page 3

will be responsible for covering all such Claims under the 2013 Federal Policy, subject only to the attachment point and limits of that policy.

The Former Directors reserve all of their rights, and waive none, with regard to the above matters. Please do not hesitate to contact me if you have any questions or wish to discuss these issues further.

Sincerely,

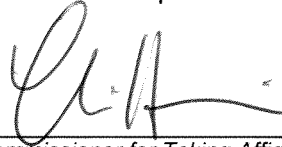
A handwritten signature in black ink, appearing to read "P. Benjamin Duke" with a stylized flourish at the end.

P. Benjamin Duke

Enclosures

cc: specialtyclaims@chubb.com

This is Exhibit "R" referred to in the Affidavit of Donald
Campbell Ross sworn September .6....., 2019



Commissioner for Taking Affidavits (or as may be)

From: [Yuen, Tammy](#)
To: [Levine, Natalie](#); [Pidlak, Rebecca](#); paul.stein@gowlingwlg.com
Cc: [Berman, Wendy](#); [Birch, John](#); [Gerny, Marissa L.](#); [Luttinger, David A Jr.](#); [Hahn, Andrew W](#); [Gerny, Marissa L.](#)
Subject: RE: Certain former directors of Sears Canada Inc. (Cassels Brock Invoices)
Date: Monday, July 15, 2019 6:12:26 PM
Attachments: [image001.gif](#)

Natalie,

We will apply the double payment for invoice no. 2070605 as you suggest. Regarding the remaining invoices, XL is processing payment of invoice no. 2080811 and partial payment of invoice no. 2080810. Following these payments, the primary XL Sears Holdings policy will be exhausted.

Regards,

Tammy

Tammy Yuen

Partner

Skarzynski Marick & Black LLP

D 212.820.7757 | **P** 212.820.7700 | **F** 212.820.7740

tyuen@skarzynski.com | [vCard](#) | [View Bio](#)



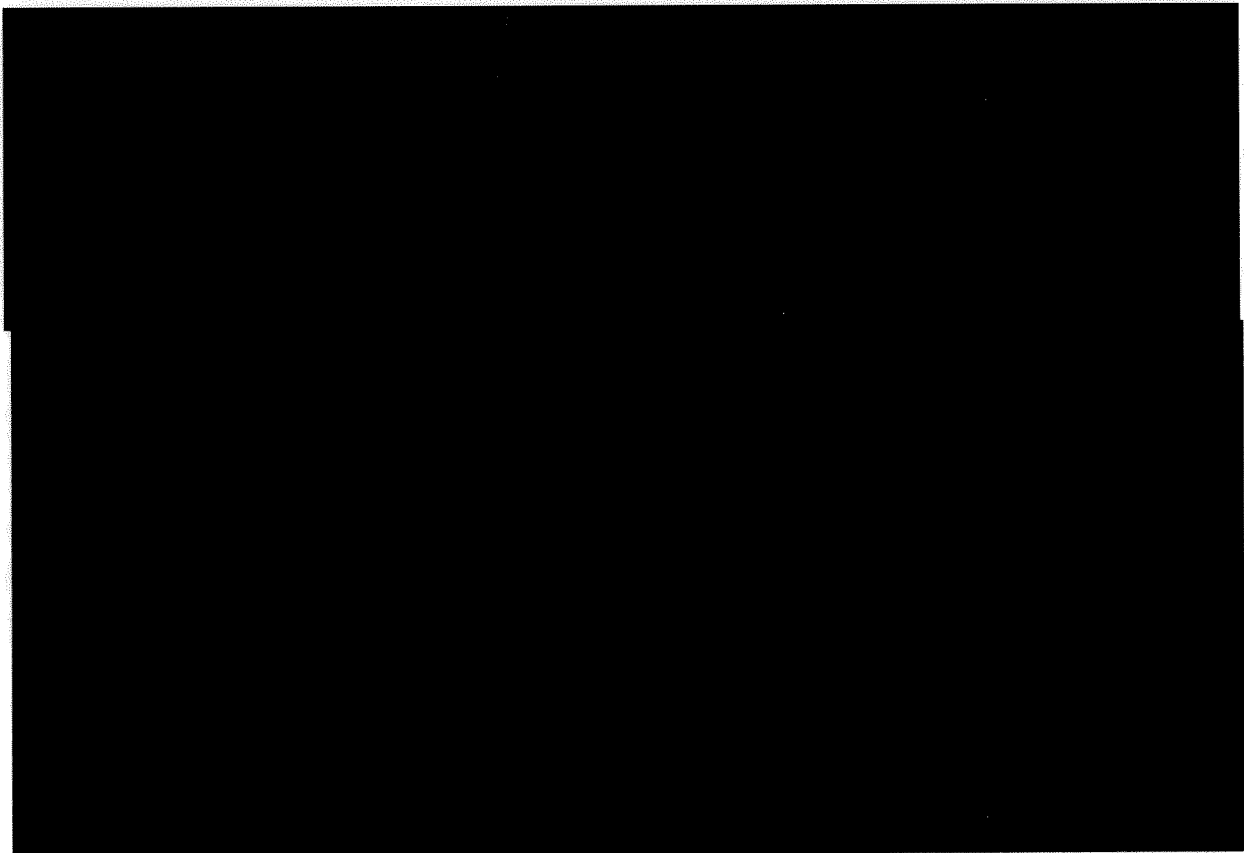
One Battery Park Plaza, 32nd Floor

New York, NY 10004

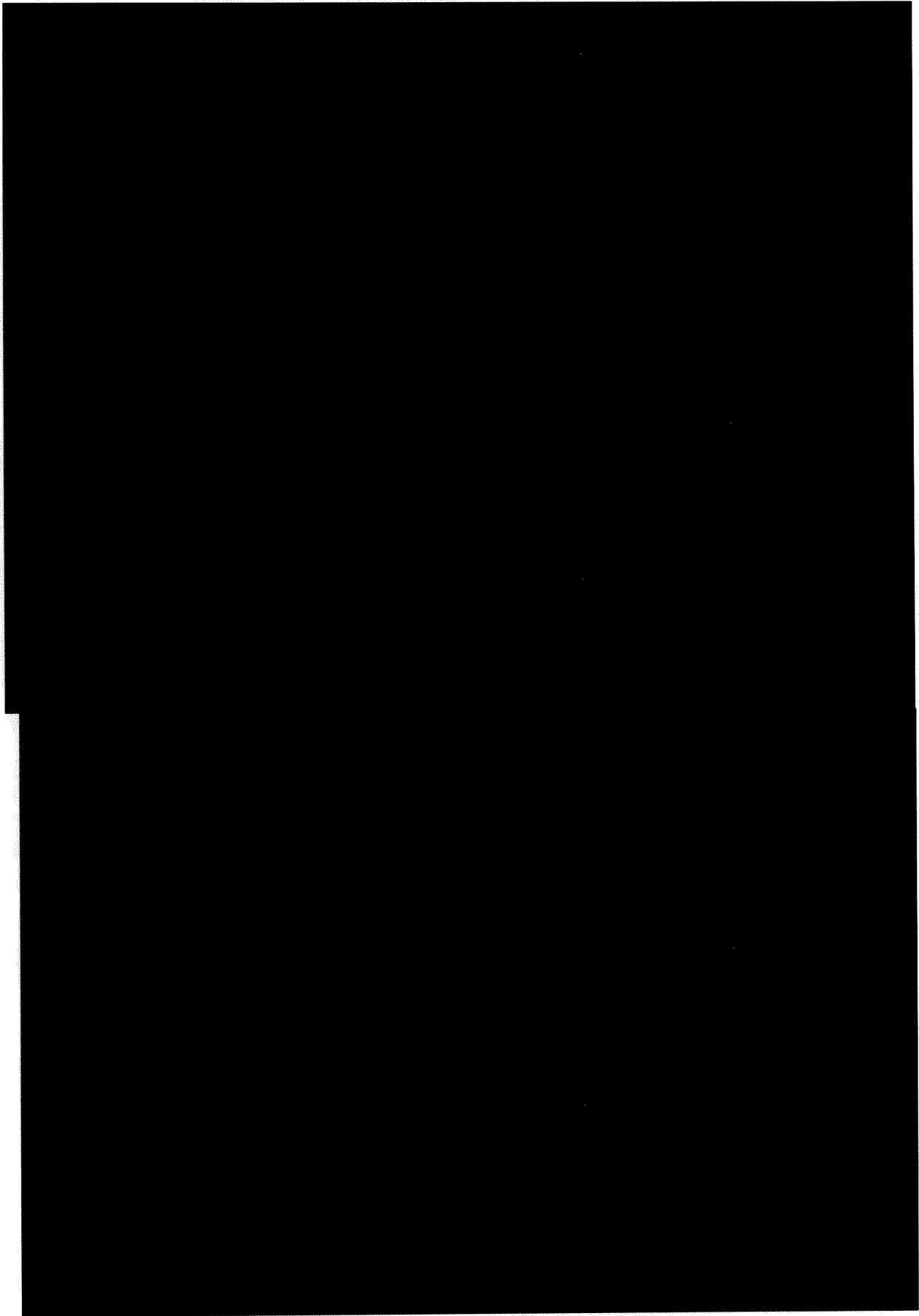
skarzynski.com

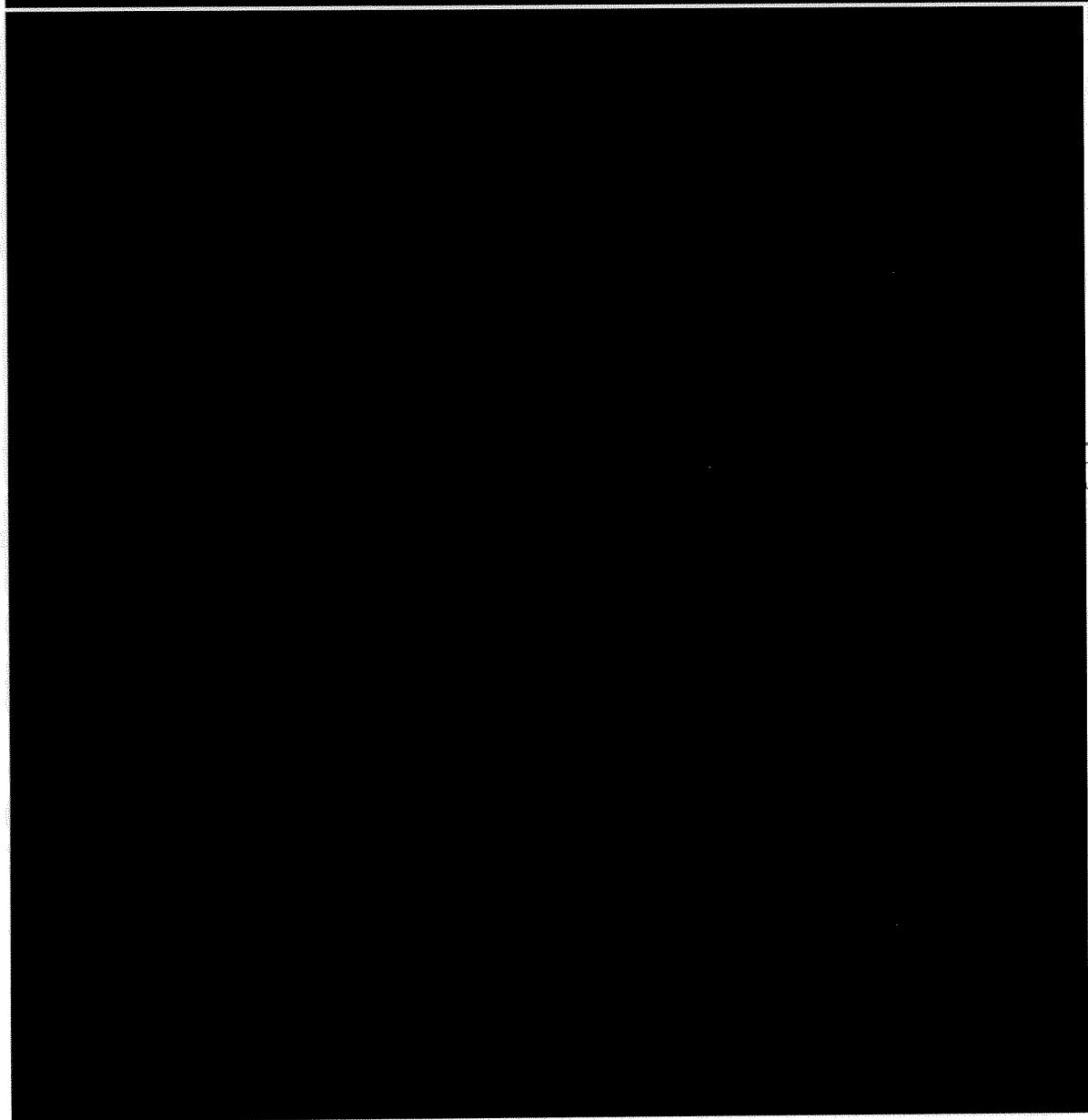
The information contained in this message may be privileged and/or confidential and is intended only for the use of the individual recipient identified above. If the reader of this message is not the intended recipient, you are hereby notified that any use, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, fax or e-mail and delete this message. Thank you.

Disclaimer Required by IRS Rules of Practice: Any discussion of tax matters contained herein is not intended or written to be used, and cannot be used, for the purpose of avoiding any penalties that may be imposed under Federal tax laws.



Natalie E Levine





ne
us
at



From: Levine, Natalie <nlevine@casselsbrock.com>


Sent: Monday, June 24, 2019 4:33 PM

To: Yuen, Tammy <tyuen@skarzynski.com>; Pidlak, Rebecca <rebecca.pidlak@axaxl.com>; paul.stein@gowlingwlg.com

Cc: Berman, Wendy <wberman@casselsbrock.com>; Birch, John <jbirch@casselsbrock.com>; Gerny, Marissa L. <mgerny@skarzynski.com>; Luttinger, David A Jr. <dluttinger@cov.com>; Hahn, Andrew W <ahahn@cov.com>

Subject: RE: Certain former directors of Sears Canada Inc. (May Invoices)

Thanks, Tammy. We would appreciate an update after the amounts are processed.



From: Yuen, Tammy <tyuen@skarzynski.com>

Sent: Monday, June 24, 2019 4:05 PM

To: Levine, Natalie <nlevine@casselsbrock.com>; Pidlak, Rebecca <rebecca.pidlak@axaxl.com>; paul.stein@gowlingwlg.com

Cc: Berman, Wendy <wberman@casselsbrock.com>; Birch, John <jbirch@casselsbrock.com>; Gerny, Marissa L. <mgerny@skarzynski.com>; Luttinger, David A Jr. <dluttinger@cov.com>; Hahn, Andrew W <ahahn@cov.com>

Subject: RE: Certain former directors of Sears Canada Inc. (May Invoices)

Natalie,

The remaining limits on the Sears Holdings policy is \$1,343,412.17. XL is processing an additional approximate \$600,000 in payments, and we can provide you with the updated limits once payment has been processed (and we have completed the conversion from CAD to USD).

Regards,

Tammy

Tammy Yuen

Partner

Skarzynski Marick & Black LLP

D 212.820.7757 | **P** 212.820.7700 | **F** 212.820.7740

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From: Levine, Natalie <nlevine@casselsbrock.com>

Sent: Monday, June 24, 2019 2:43 PM

To: Yuen, Tammy <tyuen@skarzynski.com>; Pidlak, Rebecca <rebecca.pidlak@axaxl.com>; paul.stein@gowlingwlg.com

Cc: Berman, Wendy <wberman@casselsbrock.com>; Birch, John <jbirch@casselsbrock.com>; Gerny, Marissa L. <mgerny@skarzynski.com>; Luttinger, David A Jr. <dluttinger@cov.com>; Hahn, Andrew W <ahahn@cov.com>

Subject: RE: Certain former directors of Sears Canada Inc. (May Invoices)

Tammy:

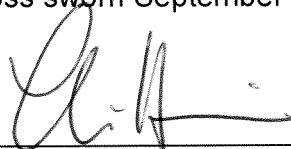
Further to my voicemail from last week, can you please let us know how much remains on the Sears Holdings policy? We have a case conference this week and will need to advise the court of the status of the insurance.

Thanks

Natalie



This is Exhibit "S" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019



Commissioner for Taking Affidavits (or as may be)



November 7, 2018

Via Email: jbirch@casselsbrock.com

Cassels Brock
2100, 40 King St W
Toronto, ON M5H 3C2

Attention: John Birch

Paul J. Stein, Q.C.
Partner
Direct +1 403 298 1084
Direct Fax +1 403 695 3484
Assistant +1 403 298 1882
paul.stein@gowlingwlg.com
File no. A158299

Dear Mr. Birch:

Re: Claims Against Certain Officers and Directors of Sears Canada Inc.

This is further to your letter of October 30, 2018. My client, XL Speciality Insurance Company ("XL") also acknowledges the receipt of the November 5, 2018 letter from Ms. Levine of your office.

You have inquired as to the specific amount of coverage that remains out of the 2015-2016 Sears Holdings policy. This will confirm that having regard to a prior settlement of a derivative

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Calgary AB T2P 4K9 Canada

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gowlingwlg.com

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CAL_LAW\ 316956711



action, there is \$3 million (USD) left of the original \$15 million (USD) limit of the 2015-2016 Sears Holdings policy.

Finally, XL has no objection to your forwarding copies of my October 22, 2018 letter, your letter of October 30, 2018 and this letter to all D & O insurers of Sears Canada Inc. and Sears Holdings Corporation.

Please note that XL continues to maintain a full reservation of rights under all policies issued to Sears Canada Inc. and Sears Holdings Corporation and all applicable law.

Yours truly,

Gowling WLG (Canada) LLP

A handwritten signature in black ink, appearing to read "P. Stein".

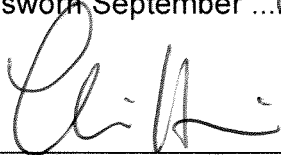
Paul J. Stein

PJS:msb:sj

cc: Rebecca Pidlak (Via Email: rebecca.pidlak@axaxl.com)

cc: Tammy Yuen (Via Email: tyuen@szarzynski.com)

This is Exhibit "T" referred to in the Affidavit of Donald
Campbell Ross sworn September ...6..., 2019



Commissioner for Taking Affidavits (or as may be)

From: Luttinger, David A Jr.
Sent: Thursday, May 02, 2019 12:30 PM
To: Yuen, Tammy
Subject: RE: Advancement Under Sears Holdings Policy

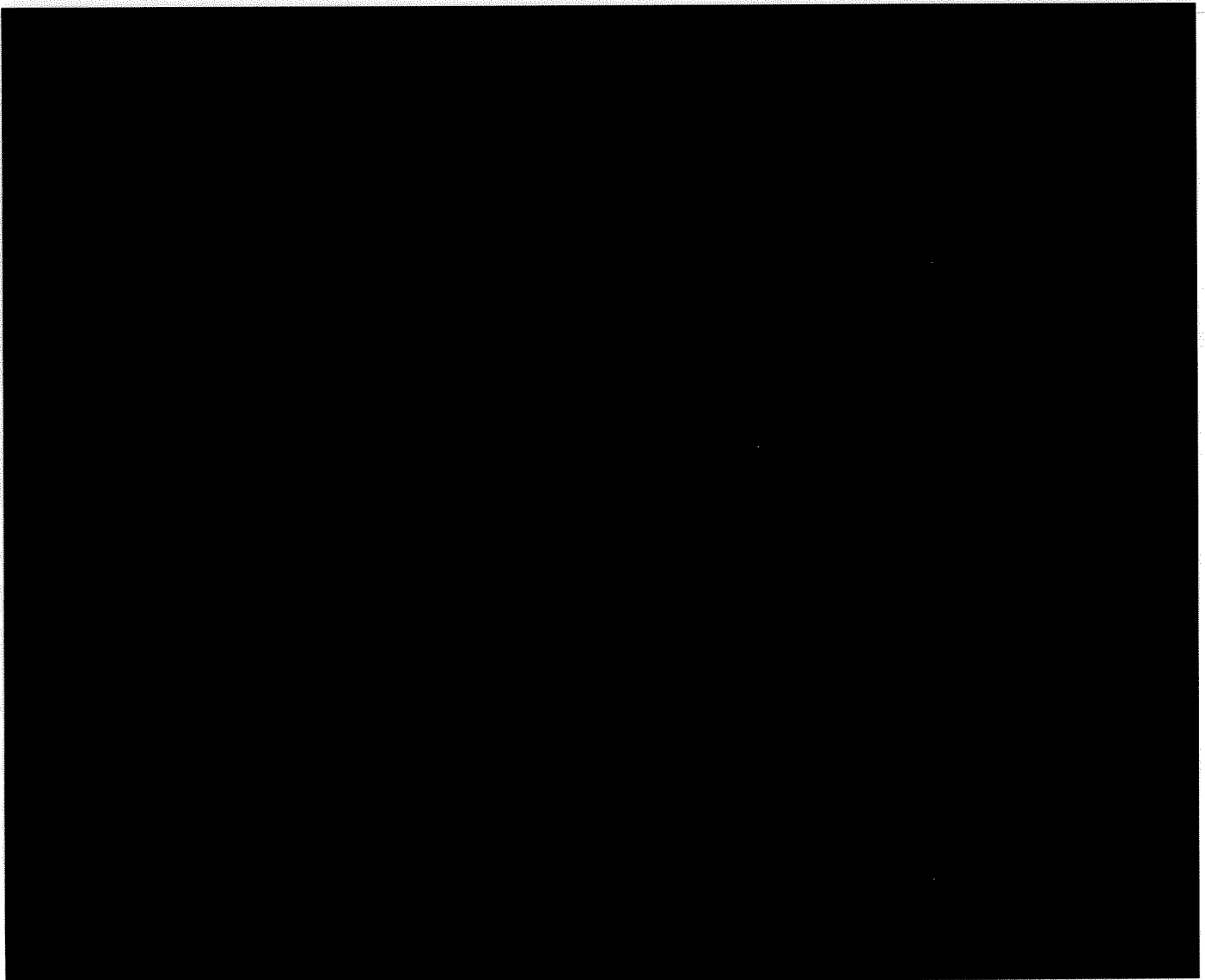
Hi Tammy. Do you have a sense of when you can provide the impairment information?

David A. Luttinger, Jr.

Covington & Burling LLP
The New York Times Building, 620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1134 | dluttinger@cov.com
www.cov.com

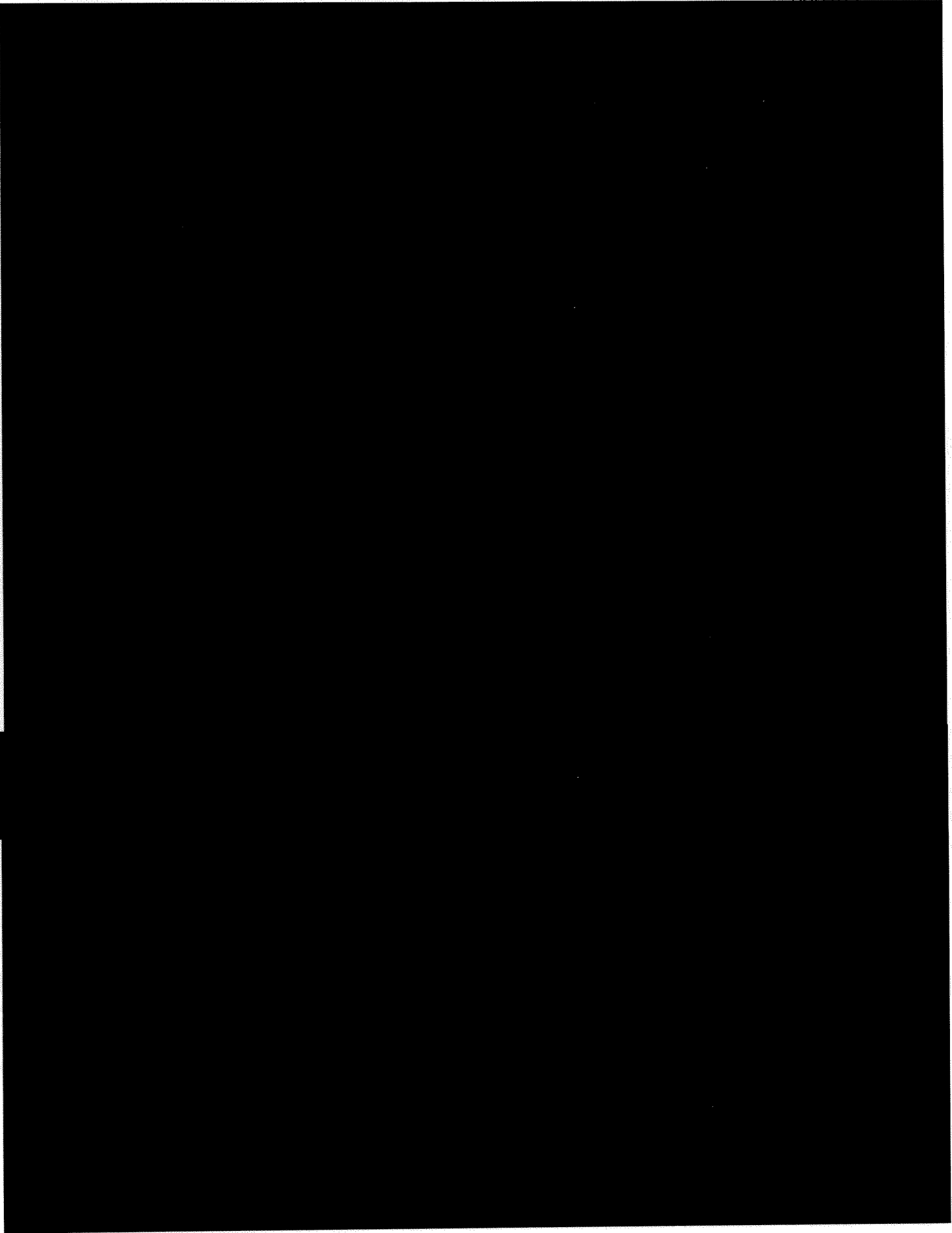
COVINGTON

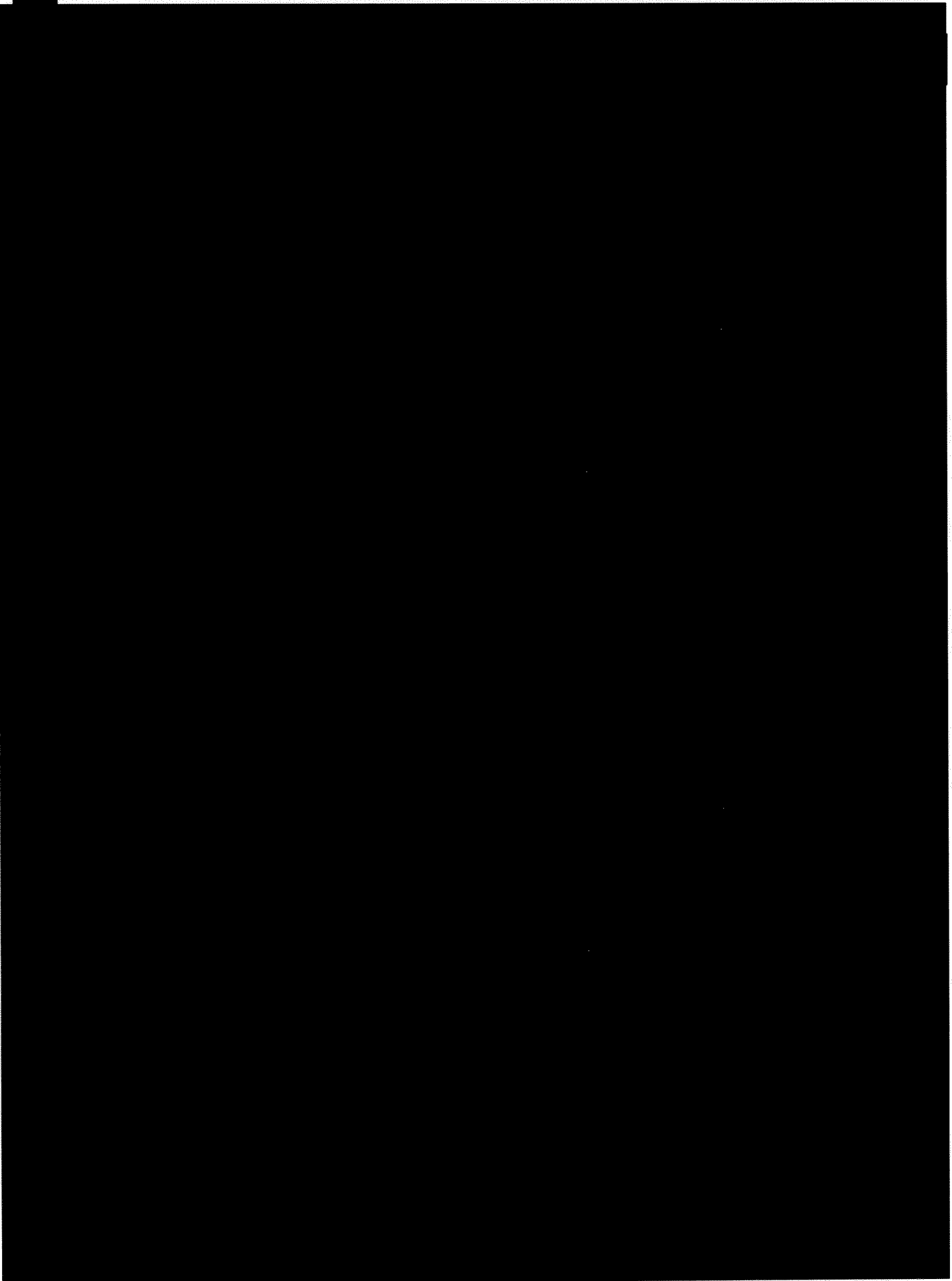
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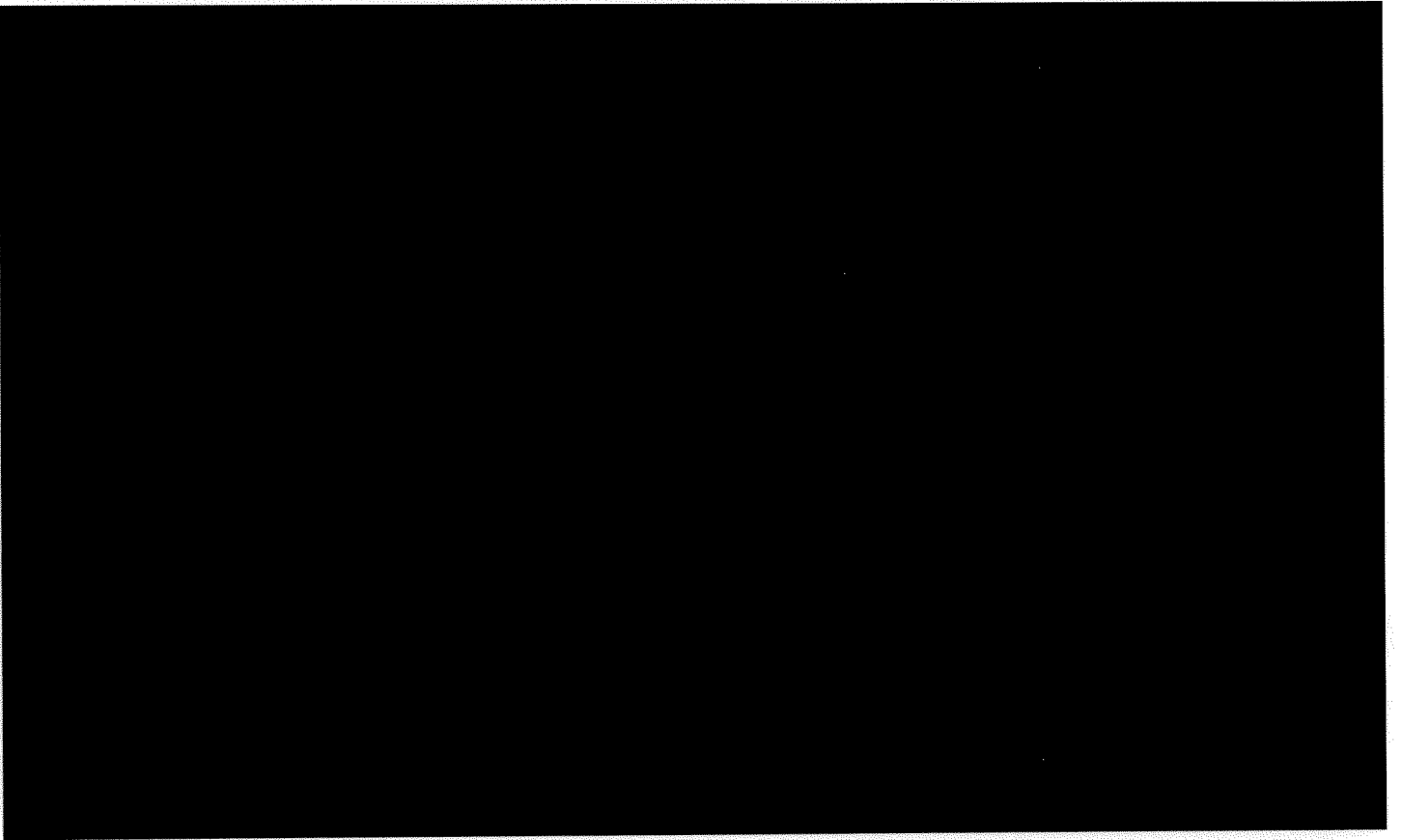


[REDACTED]

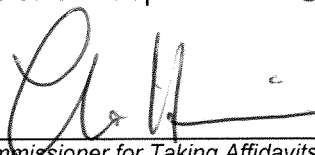
[REDACTED]







This is Exhibit "U" referred to in the Affidavit of Donald
Campbell Ross sworn September 5, 2019



Commissioner for Taking Affidavits (or as may be)

From: Levine, Natalie
Sent: Monday, June 24, 2019 4:33 PM
To: Yuen, Tammy; Pidlak, Rebecca; paul.stein@gowlingwlg.com
Cc: Berman, Wendy; Birch, John; Gerny, Marissa L.; Luttinger, David A Jr.; Hahn, Andrew W
Subject: RE: Certain former directors of Sears Canada Inc. (May Invoices)
Attachments: Certain former directors of Sears Canada Inc. (November Invoices)

Thanks, Tammy. We would appreciate an update after the amounts are processed.



Natalie E Levine

Direct: +1 416 860 6568 • Fax: +1 416 640 3207 • nlevine@casselsbrock.com
2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, Canada M5H 3C2
www.casselsbrock.com

From: Yuen, Tammy <tyuen@skarzynski.com>
Sent: Monday, June 24, 2019 4:05 PM
To: Levine, Natalie <nlevine@casselsbrock.com>; Pidlak, Rebecca <rebecca.pidlak@axaxl.com>; paul.stein@gowlingwlg.com
Cc: Berman, Wendy <wberman@casselsbrock.com>; Birch, John <jbirch@casselsbrock.com>; Gerny, Marissa L. <mgerny@skarzynski.com>; Luttinger, David A Jr. <dluttinger@cov.com>; Hahn, Andrew W <ahahn@cov.com>
Subject: RE: Certain former directors of Sears Canada Inc. (May Invoices)

Natalie,

The remaining limits on the Sears Holdings policy is \$1,343,412.17. XL is processing an additional approximate \$600,000 in payments, and we can provide you with the updated limits once payment has been processed (and we have completed the conversion from CAD to USD).

Regards,
Tammy

Tammy Yuen

Partner
Skarzynski Marick & Black LLP

D 212.820.7757 | **P** 212.820.7700 | **F** 212.820.7740
tyuen@skarzynski.com | vCard | View Bio

Skarzynski | Marick

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From: Levine, Natalie <nlevine@casselsbrock.com>

Sent: Monday, June 24, 2019 2:43 PM

To: Yuen, Tammy <tyuen@skarzynski.com>; Pidlak, Rebecca <rebecca.pidlak@axaxl.com>; paul.stein@gowlingwlg.com

Cc: Berman, Wendy <wberman@casselsbrock.com>; Birch, John <jbirch@casselsbrock.com>; Gerny, Marissa L. <mgerny@skarzynski.com>; Luttinger, David A Jr. <dluttinger@cov.com>; Hahn, Andrew W <ahahn@cov.com>

Subject: RE: Certain former directors of Sears Canada Inc. (May Invoices)

Tammy:

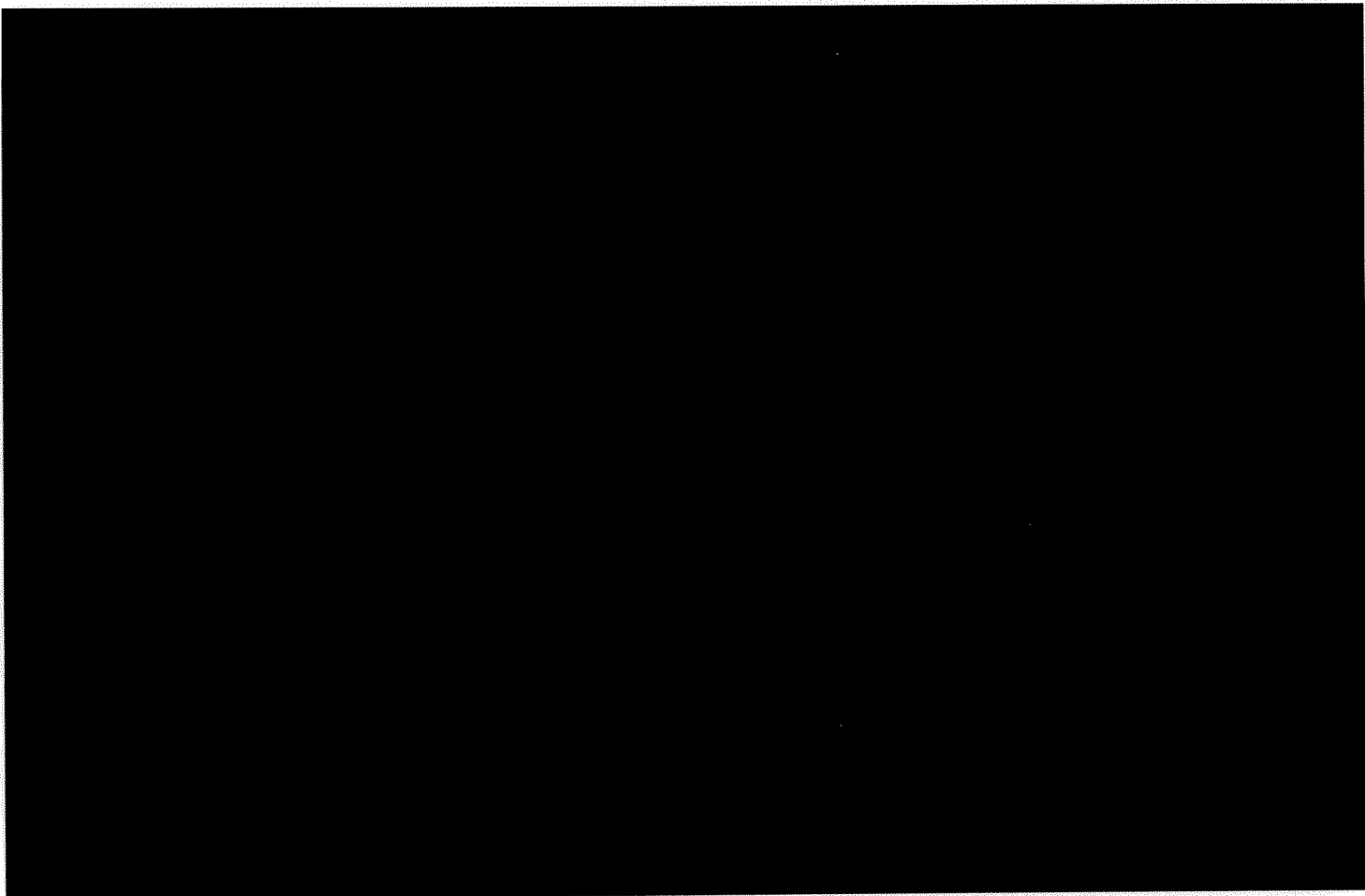
Further to my voicemail from last week, can you please let us know how much remains on the Sears Holdings policy? We have a case conference this week and will need to advise the court of the status of the insurance.

Thanks
Natalie




Natalie E Levine

Direct: +1 416 860 6568 • Fax: +1 416 640 3207 • nlevine@casselsbrock.com
2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, Canada M5H 3C2
www.casselsbrock.com



This is Exhibit "V" referred to in the Affidavit of Donald
Campbell Ross sworn September 6, 2019

A handwritten signature in black ink, appearing to be 'C.H.' with a horizontal line extending to the right.

Commissioner for Taking Affidavits (or as may be)

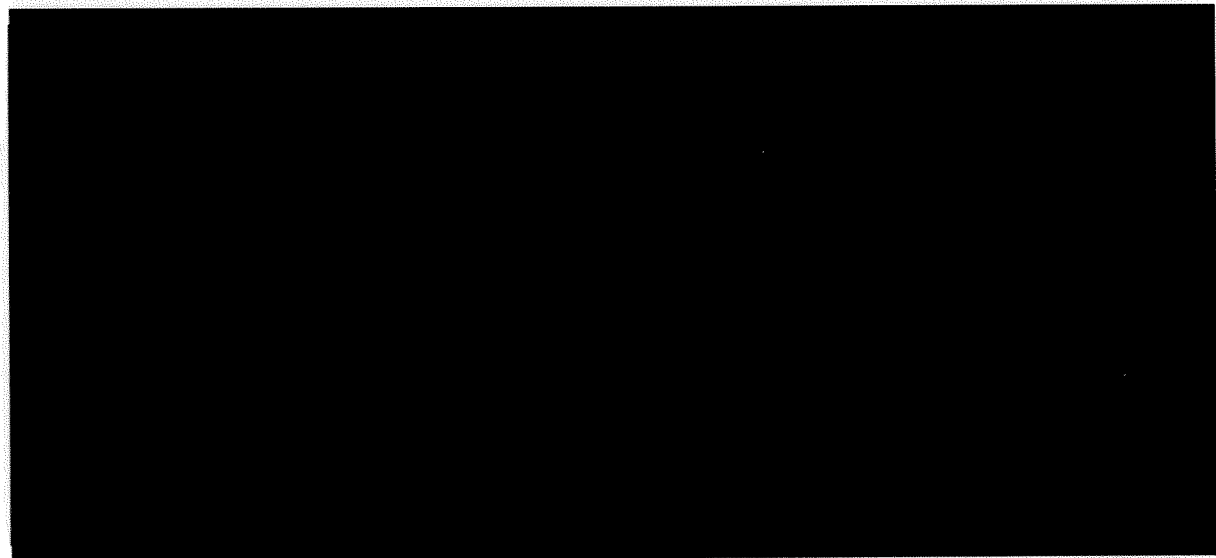
From: [Levine, Natalie](#)
To: [Yuen, Tammy](#); [Pidlak, Rebecca](#); paul.stein@gowlingwlg.com
Cc: [Berman, Wendy](#); [Birch, John](#); [Gerny, Marissa L.](#); [Luttinger, David A Jr.](#); [Hahn, Andrew W.](#); [Gerny, Marissa L.](#)
Subject: RE: Certain former directors of Sears Canada Inc. (Cassels Brock Invoices)
Date: Wednesday, July 10, 2019 5:31:05 PM
Attachments: [image001.gif](#)


Hi Tammy:

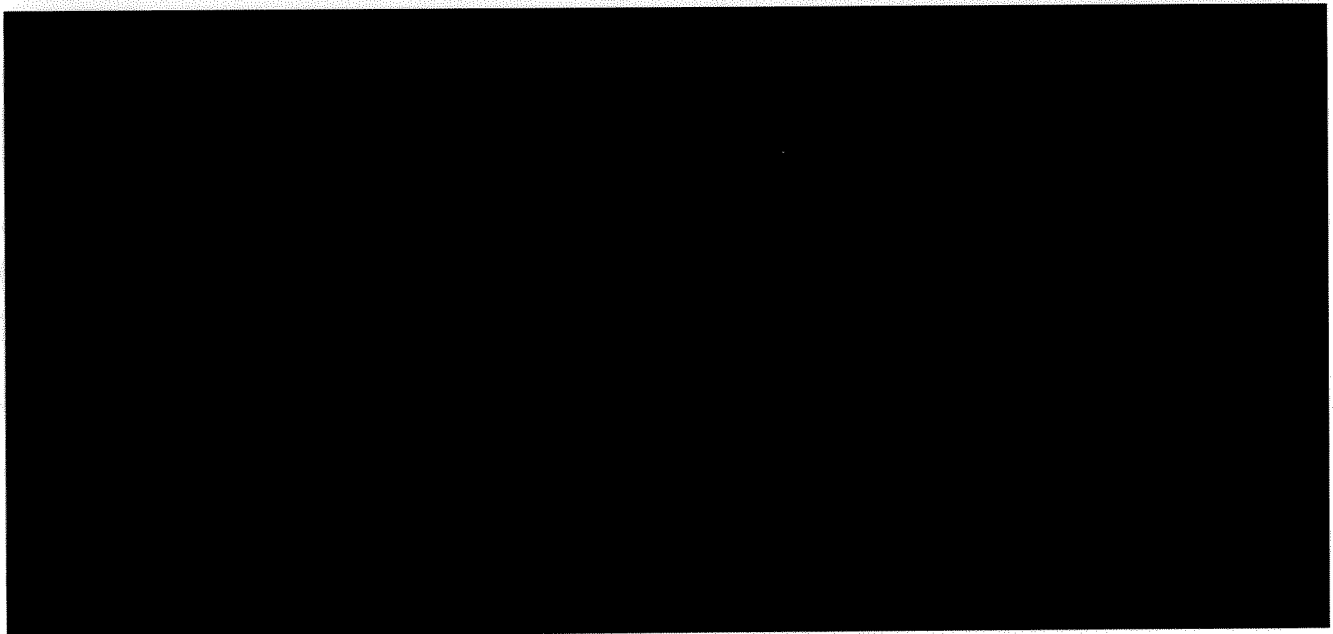


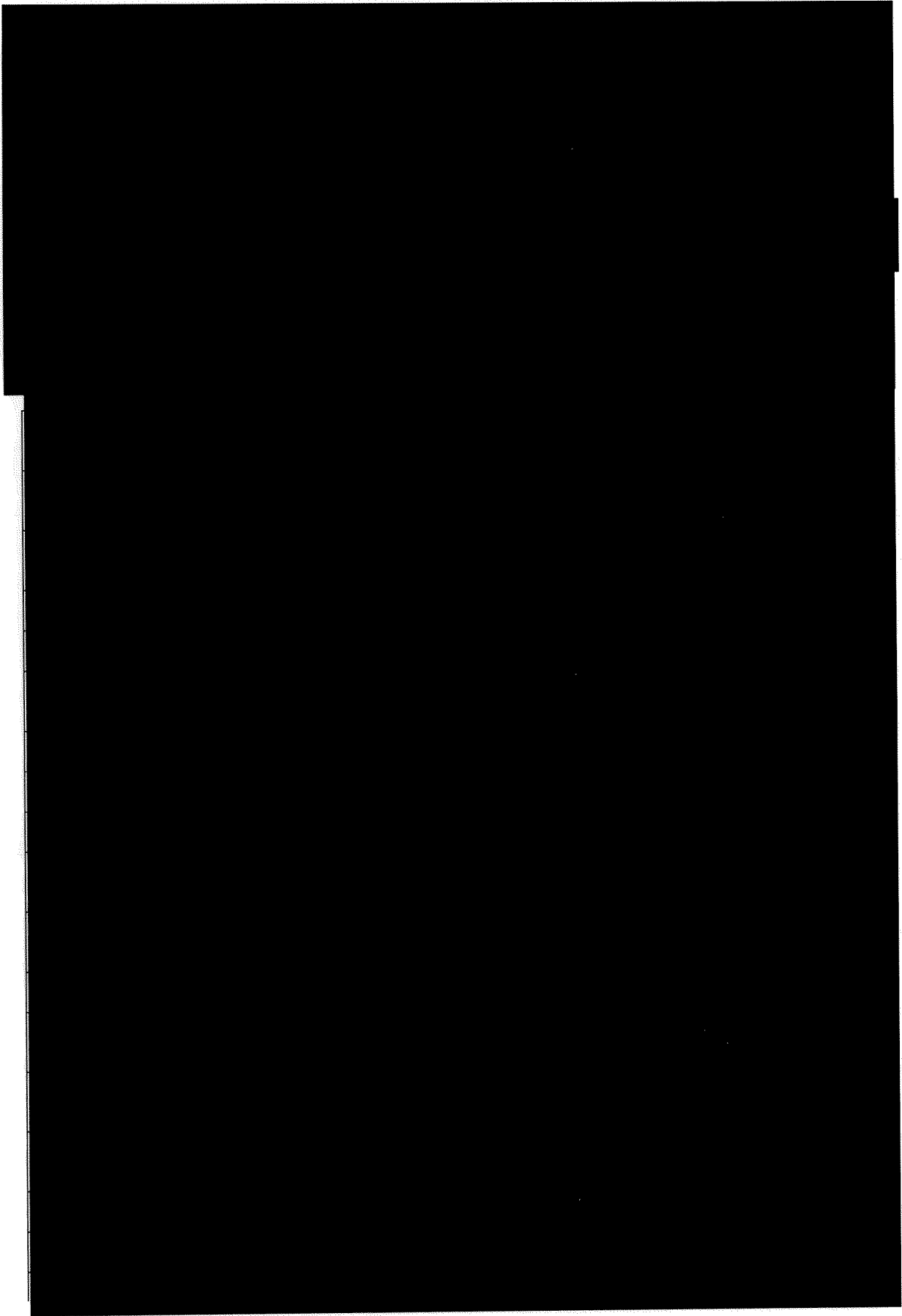
For our records, are you able to provide the updated amount remaining on the policy after these invoices are paid?

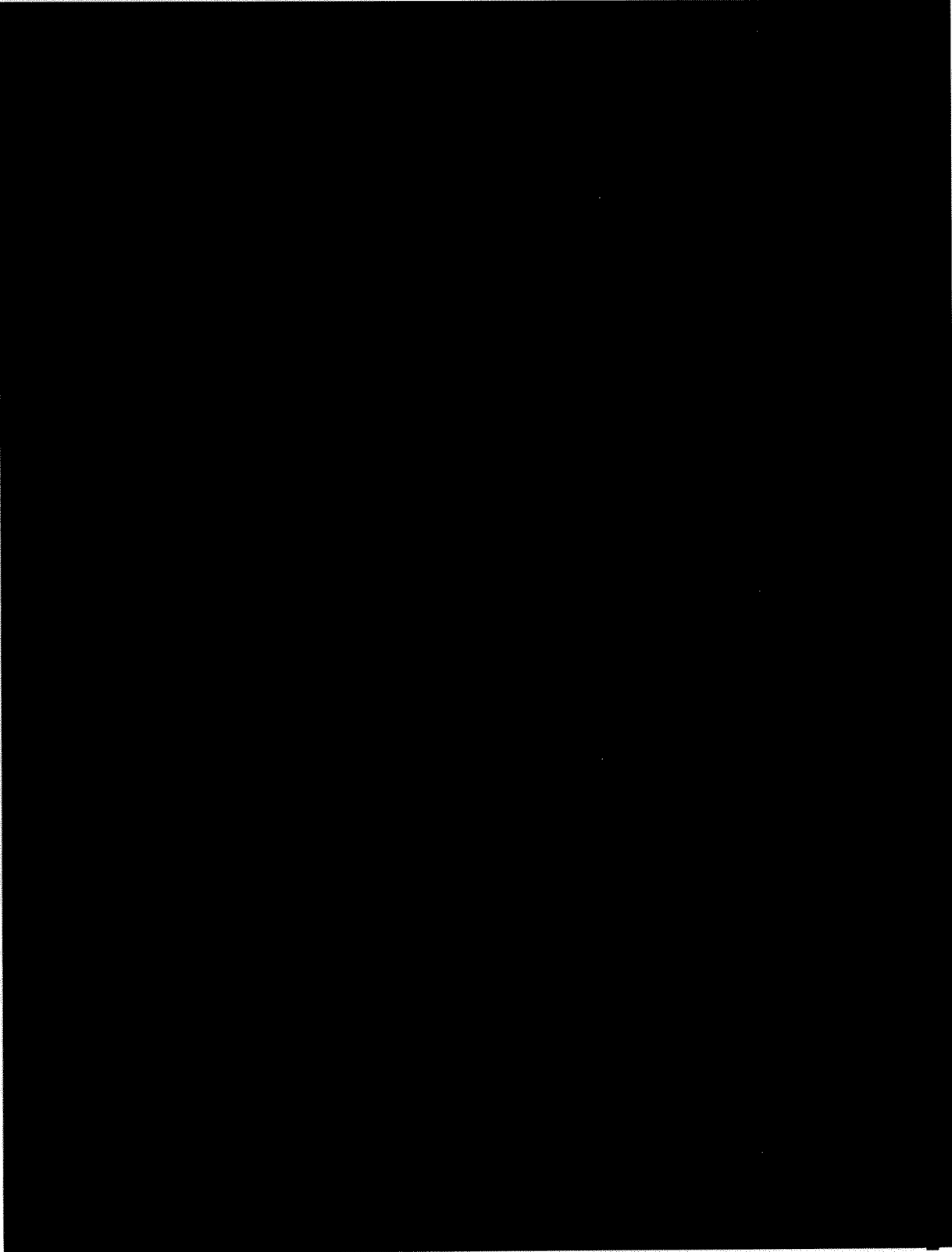
Thanks
Natalie

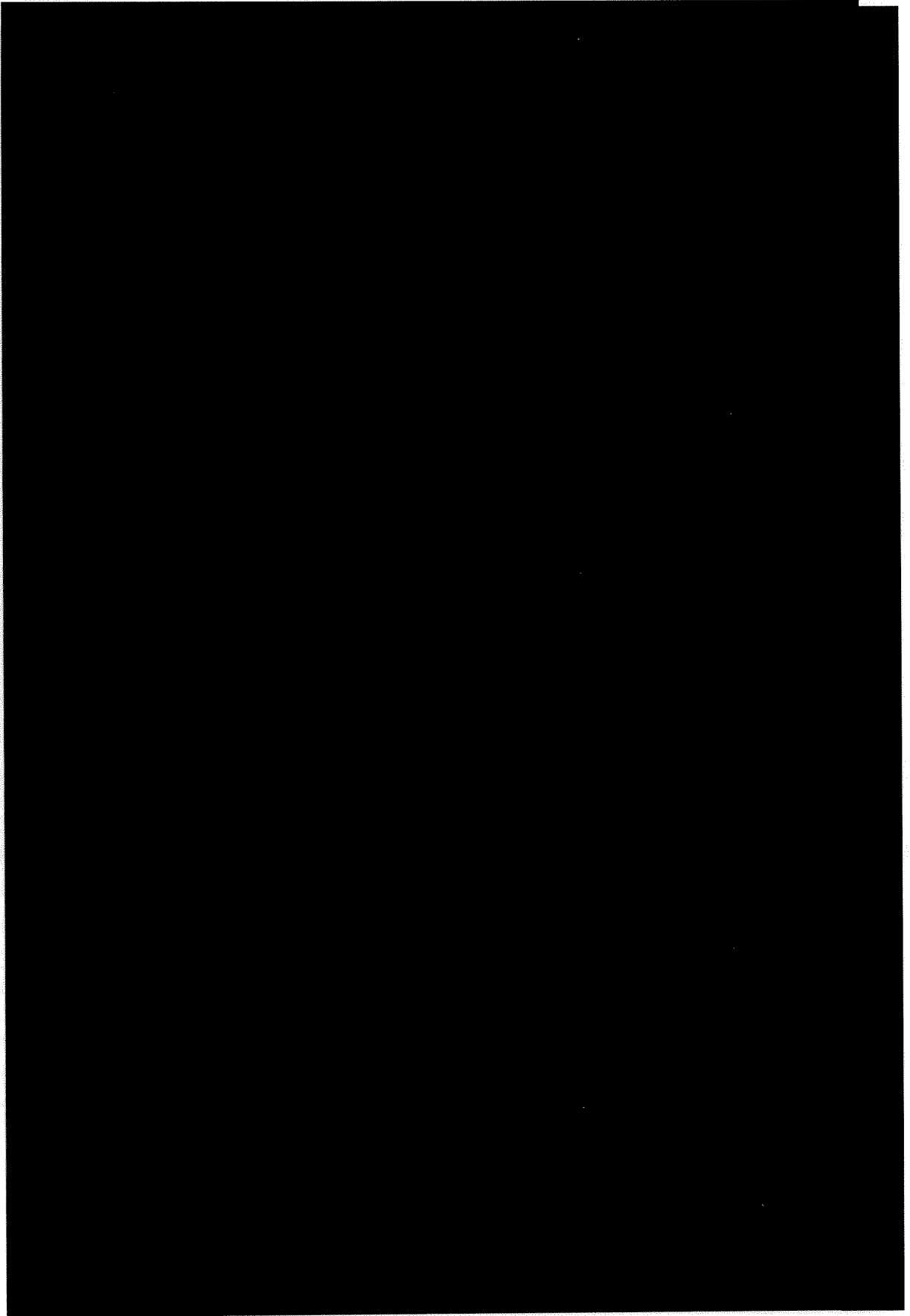


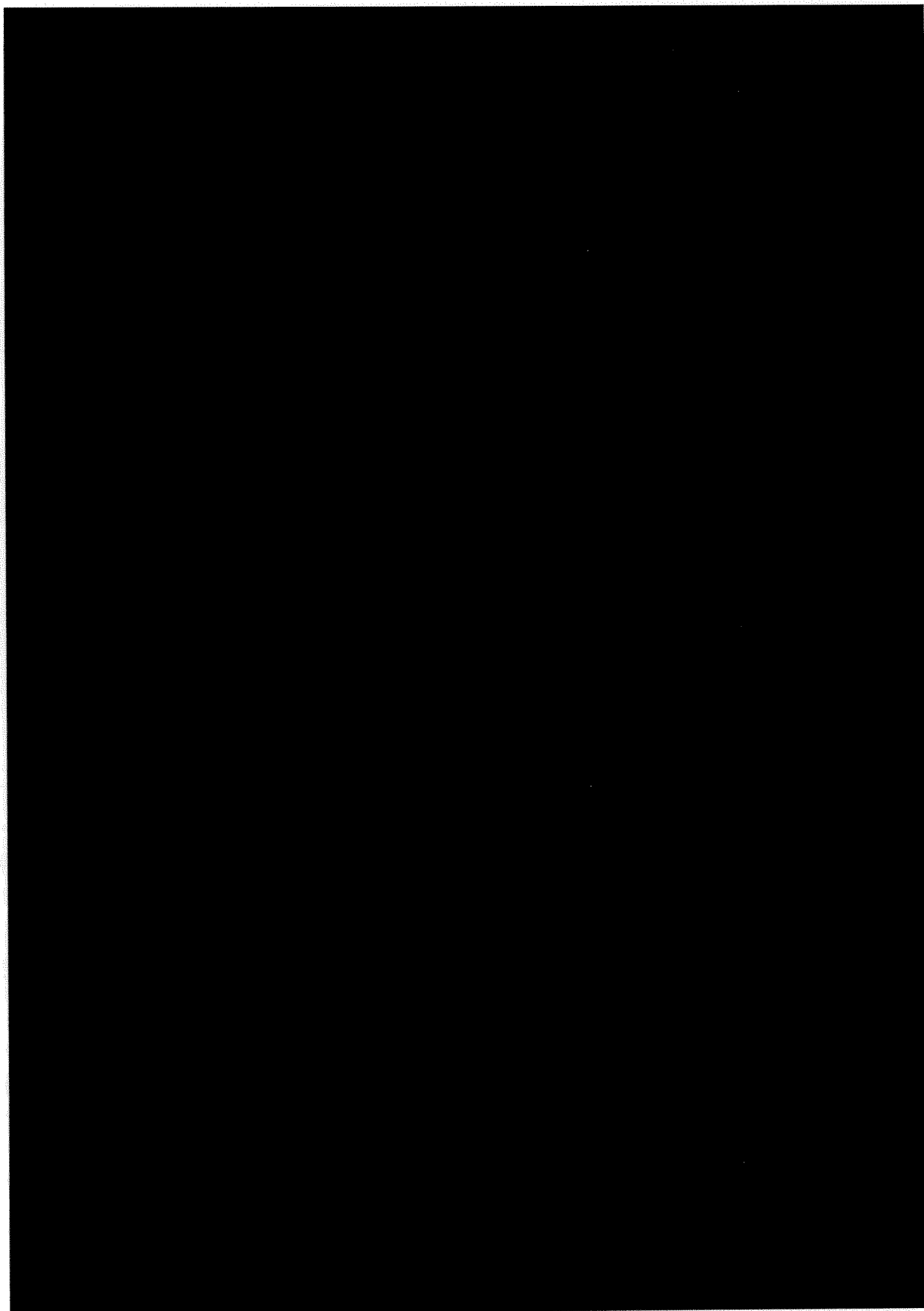
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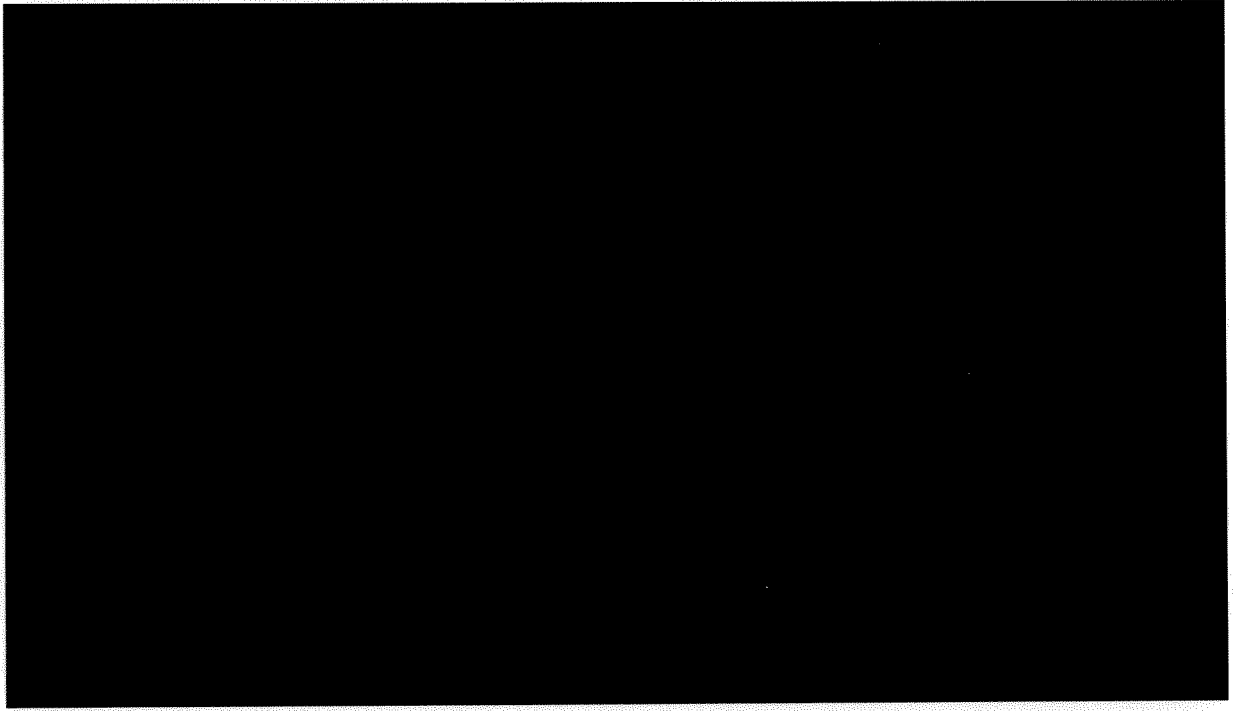












FTI CONSULTING CANADA INC.
J. DOUGLAS CUNNINGHAM, Q.C.
MORNEAU SHEPELL LTD.
1291079 ONTARIO LIMITED
Plaintiffs

-and- ESL INVESTMENTS INC *et al.*

Court File No.: CV-18-00611219-00CL
Court File No. CV-18-00611214-00CL
Court File No. CV-18-00611217-00CL
Court File No. CV-19-617792-00CL

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

REPLY MOTION RECORD OF THE DEFENDANTS
BIRD, CAMPBELL, CROWLEY, HARKER, MCBURNEY, ROSS, ROSATI
AND KHANNA (Returnable before the Honourable Justice McEwen on
September 19, 2019)

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William Crowley, William Harker,
James McBurney and Donald Ross