

CV-18-00611219-00CL
CV-18-00611214-00CL
CV-18-00611217-00CL
CV-19-00617792-00CL
CV-17-11846-00CL

Court File Number:

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

FTI / Sears / Morrow Stepell / 1291079 / CCAA
Plaintiff(s) matter

AND

ESL Investments et al
Defendant(s)

Case Management Yes No by Judge: McEWEN

Counsel	Telephone No:	Facsimile No:
as per counsel slip.		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows):

The Plaintiffs collectively bring this motion for an Order approving the settlement between them and Sears Holding Corporation (SHC). The Director Defendants do not oppose. The ESL Defendants and Edward Lampert (collectively ESL) generally do not oppose the motion, but a

17 March 20
Date

McEWEN
Judge's Signature

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Judges Endorsement Continued

dispute has arisen between the Plaintiffs and ESL concerning specific language ESL proposes be included in paragraph 12 of its draft order.

Given the COVID-19 crisis, I am preparing my endorsement ⁱⁿ hand, given the lack of resources and timelines provided for in the settlement agreement.

For the reasons that follow I am of the view that the proposed wording of the Plaintiffs is preferable with respect to the language contained in paragraph 12 and that the additional language proposed by ESL shall not be included.

I begin my analysis by reiterating that there is only one discrete issue in dispute.

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Judges Endorsment Continued

Otherwise the parties have agreed to the material terms of the settlement agreement, and order.

In this regard, I agree that the terms of the settlement are reasonable and consistent with the terms of settlements generally entered into that involve insolvent companies.

I further agree that the terms dealing with the ongoing litigation are reasonable and in keeping generally with the law that has evolved concerning Pierringer agreements.

I also further agree that the settlement meets the criteria necessary to approve a settlement under the CCAA.

This takes me to the disputed wording in paragraph 12.

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At the motion I advised counsel that I had difficulty with ESL's proposed wording since it envisioned disputes concerning insurance coverage, proofs of claim held by Mr. Lambert in SNC's Chapter 11 proceedings, and claims held by entities unknown to this Court - "TPP LLC" or "TPP II LLC". ESL also did not file any materials, so as to lay-out an evidentiary basis for its submissions, or to educate me as to how these concerns, presumably surrounding future events in the USA, were material.

I urged counsel to attempt to agree on wording that I could incorporate into this endorsement to deal with the Plaintiffs' and/or ESL's concerns, failing which

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Judges Endorsment Continued

They could propose suitable language.
They could not agree and have
made their submissions.

I have reviewed the submissions.
In my view the best way to
reflect my thinking (in not
allowing ESL's proposed language) is
to set out the following: ✓

- Counsel have advised me that Mr
Lampert has apparently filed Proofs of
Claim in the US Chapter 11 proceedings
asserting indemnification rights from
SHC arising his American employment
agreement and SHC's articles of
incorporation.

- These Proofs of Claims are not
before me; nor is any information
about insurance issues, or anything
concerning TAP LLC or TAP II LLC.

- It appears that ESL's main

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Concern about paragraph 12 of the Plaintiffs' draft order is that the bar orders should not extinguish certain claims by Mr. Lampert that may be available in the Chapter 11 proceedings along with insurance claims and claims by JPP LLC and for JPP II LC.

• I do not accept that these concerns should cause me to amend the wording of paragraph 12 as suggested by ESL.

• As per paragraph 9 of the Amended Settlement Agreement, the settlement before me requires independent approval in the United States Chapter 11 proceeding involving JHE.

• Nothing in my order prevents ESL from raising any of its concerns in those ~~proceedings~~ U.S.

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proceedings at any time.

• I am not attempting, in any way, to suggest or influence how the U.S. Bankruptcy Court ought to deal with upcoming settlement approval motion.

• I am therefore not prepared to incorporate ESL's proposed language concerning limitations on the claim bar in the above circumstances. SHC submits, and I accept, that the language of the Order should not be diluted. The protection that SHC enjoys under the settlement is an assurance that claims that arise in these actions are extinguished. That is what is being dealt with in the Order and settlement agreement.

• Matters that ~~arise~~ⁱⁿ arise entirely independently in the U.S. (Per

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example, issues arising from U.S. contracts) can be dealt with by the appropriate U.S. Court at that time.

To incorporate ESL's language could undermine the above protection afforded to SIFC in the negotiated form of order and settlement agreement.

I see little, if any, prospect of prejudice to ESL given what I have stated above. ESL maintains it right to raise any and all of its positions in the U.S.

proceedings

The Order shall go in the form proposed by the Plaintiff. I would ask that the final form of order be emailed to me as soon as possible for signature, given developing

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events surrounding the pandemic.

[Handwritten signature]