

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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

Plaintiff

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, DONALD ROSS, and SEARS
HOLDINGS CORP.

Defendants

**STATEMENT OF DEFENCE OF THE DEFENDANT,
SEARS HOLDINGS CORP.**

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

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

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

No Knowing Assistance or Knowing Receipt

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

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

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

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

No Unjust Enrichment

9. SHC was not unjustly enriched by the payment of the 2013 Dividend. SHC was not enriched at all by the 2013 Dividend, and SHC has no knowledge of any corresponding deprivation to SCI or its creditors.

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

No Oppression

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

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

- (a) SHC is not a proper respondent to an oppression claim, as SHC had no actual or constructive knowledge of whether the 2013 Dividend was oppressive, unfairly prejudicial, or unfairly disregarded the interests of SCI or its creditors;
- (b) Any involvement in the decision to declare the 2013 Dividend is not attributable to SHC;
- (c) The Plaintiff has no standing to assert a claim for oppression. The Plaintiff is not a complainant within the meaning of Section 241 of the *Canada Business Corporations Act*, RSC, 1985, c C-44, as amended (the “*CBCA*”);
- (d) SCI cannot be an oppressed person under the oppression provisions of the *CBCA*. Pursuant to section 241 (2) of the *CBCA*, only a “security holder, creditor, director or officer” may be an oppressed person. SCI is not a security holder, creditor, director or officer of itself; and

13. Creditors who extended credit or performed services after November, 2013 are not “creditors” within the meaning of s. 241 of the *CBCA* and the Plaintiff cannot advance an oppression claim on their behalf.

14. Creditors who extended credit or performed services after November 2013 did so with full knowledge that the 2013 Dividend was paid and of SCI’s publicly disclosed financial position. They could not have had a reasonable expectation that the 2013 Dividend would not be paid.

15. Creditors whose claims have been satisfied have suffered no monetary loss and their reasonable expectations could not have been frustrated by the declaration of the 2013 Dividend.

16. There is no entitlement to oppression relief under the CBCA as no case for oppression has been made out. The Plaintiff fails to identify the reasonable expectations of particular classes of creditors on which it relies.

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

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

No Conspiracy

19. The Amended Amended Statement of Claim fails to allege facts which, if proven, would establish a tortious conspiracy attributable to SHC. In any case, SHC is not liable for any tortious conspiracy related to the 2013 Dividend or otherwise.

20. No planning or direction of any breach of fiduciary duty, breach of duty of care, or oppressive conduct by the Former Directors or Bird is attributable to SHC. No unlawful acts to carry out any alleged conspiracy are attributable to SHC.

21. SHC has no knowledge of any agreement in late 2012 and early 2013, or at any other time, as alleged, amongst Lampert, Crowley, Harker, and Bird to sell SCI's assets and distribute the bulk of the proceeds to SHC and the ESL Parties. If such an agreement was entered into, none of

Lampert, Crowley, Harker, or Bird entered into the agreement on behalf of SHC nor was any knowledge that they may have had about any such agreement attributable to SHC.

22. SHC has no knowledge of any agreement amongst Lampert, the Former Directors, and Bird to authorize the payment of the 2013 Dividend for the benefit of SHC and the ESL Parties. SHC is not aware of any such agreement. If such an agreement was entered into, none of Lampert, the Former Directors, or Bird entered into the agreement on behalf of SHC nor was any knowledge that they may have had about any such agreement attributable to SHC.

23. SHC has no knowledge of any act in furtherance of any agreement amongst Lampert, the Former Directors, and Bird to authorize the payment of the 2013 Dividend, or to sell SCI's assets and distribute the bulk of the proceeds to SHC and the ESL Parties, and no such alleged act, if any, is attributable to SHC.

The Action is Time-Barred

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

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

September 16, 2019

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter J. Osborne (33420C)

Tel: (416) 865-3094
Fax: (416) 865-3974
Email: posborne@litigate.com

Matthew B. Lerner (55085W)

Tel: (416) 865-2940
Fax: (416) 865-2840
Email: mlerner@litigate.com

Chris Kinnear Hunter (65545D)

Tel: (416) 865-2874
Fax: (416) 865-2866
Email: chunter@litigate.com

Chris Trivisonno (73997C)

Tel: (416) 865-3059
Fax: (416) 865-3707
Email: ctrivisonno@litigate.com

Lawyers for the Defendant, Sears Holdings Corp.

TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**

Counsel
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

Matthew P. Gottlieb (32268B)

Email: mgottlieb@lolg.ca
Tel: (416) 644-5353

Andrew Winton (54473I)

Email: awinton@lolg.ca
Tel: (416) 644-5342

Philip Underwood (73637W)

Email: punderwood@lolg.ca
Tel: (416) 645-5078

Tel: (416) 598-1744
Fax: (416) 598-3730

Lawyers for the Plaintiff, Sears Canada Inc.,
by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.

AND TO: **POLLEY FAITH LLP**
80 Richmond Street West
Suite 1300
Toronto, ON M5H 2A4

Harry Underwood (20806C)
Email: hunderwood@polleyfaith.com
Tel: (416) 365-6446

Andrew Faith (47795H)
Email: afaith@polleyfaith.com
Tel: (416) 365-1602

Jeffrey Haylock (61241F)
Email: jhaylock@polleyfaith.com
Tel: (416) 365-0404

Sandy Lockhart (73554J)
Email: slockhart@polleyfaith.com
Tel: (416) 365-6450

Tel: (416) 365-1600
Fax: (416) 365-1601

Lawyers for the Defendants,
ESL Investments Inc., ESL Partners LP, SPE I Partners LP, SPE Master I LP,
ESL Institutional Partners LP, and Edward S. Lampert

AND TO: **CASSELS BROCK & BLACKWELL LLP**

Barristers and Solicitors
Scotia Plaza
40 King Street West
Suite 2100
Toronto, ON M5H 3C2

John N. Birch (38968U)

Email: jbirch@casselsbrock.com
Tel: (416) 860-5225
Fax: (416) 640-3057

Wendy Berman

Email: wberman@casselsbrock.com
Tel: (604) 860-2926
Fax: (604) 640-3107

Bill Burden

Email: bburden@casselsbrock.com
Tel: (416) 869-5963
Fax: (416) 640-3019

Tel: (416) 869-5300
Fax: (416) 360-8877

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

AND TO: **BENNETT JONES LLP**

3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Richard Swan

Email: swanr@bennettjones.com
Tel: (416) 777-7479

Sean Zweig

Email: zweigs@bennettjones.com
Tel: (416) 777-6254

Tel: (416) 863-1200
Fax: (416) 863-1716

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

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

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

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STATEMENT OF DEFENCE OF THE DEFENDANT,
SEARS HOLDINGS CORP.

LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP

Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter J. Osborne (33420C)

Tel: (416) 865-3094
Fax: (416) 865-3974
Email: posborne@litigate.com

Matthew B. Lerner (55085W)

Tel: (416) 865-2940
Fax: (416) 865-2840
Email: mlerner@litigate.com

Chris Kinnear Hunter (65545D)

Tel: (416) 865-2874
Fax: (416) 865-2866
Email: chunter@litigate.com

Chris Trivisonno (73997C)

Tel: (416) 865-3059
Fax: (416) 865-3707
Email: ctrivisonno@litigate.com

Lawyers for the Defendant, Sears Holdings Corporation