

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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, SEARS HOLDINGS
CORPORATION, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

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

1. Except as expressly hereinafter pleaded, the Defendant, Sears Holdings Corporation (“SHC”), has no knowledge of the allegations contained in the Amended Statement of Claim.
2. In particular, SHC has no knowledge 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 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.

Section 96 of the BIA Does Not Apply to the 2013 Dividend

5. Section 96 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “**BIA**”) does not provide a cause of action for the recovery of dividends. The recovery of dividends is specifically addressed in s. 101 of the BIA.

6. The declaration and payment of a dividend to the shareholders of Sears Canada Inc. (“**SCI**”) in November and December of 2013 (the “**2013 Dividend**”) does not constitute a transfer at undervalue under ss. 2 and 96 of the BIA. A dividend cannot be undervalued. Dividends have no fair market value and do not involve any exchange of value. No consideration is ever received from shareholders in exchange for a dividend. A dividend is a distribution of profits to shareholders.

The Elements of s. 96 are Not Satisfied

7. Even if s. 96 applied to the 2013 Dividend, which is expressly denied, the elements of Section 96 are not satisfied as against SHC.

8. At all material times, including when the 2013 Dividend was declared and paid, SHC dealt at arm's length with SCI and its Directors. At all material times, SHC and SCI were not "related persons" under s. 4 of the BIA. As such, even if s. 96 applied to the 2013 Dividend, which is expressly denied, the Monitor could assert its claim only under s. 96(1)(a) of the BIA.

9. SCI was not insolvent at the time of the 2013 Dividend. SCI was not rendered insolvent by the 2013 Dividend. No act or omission in the declaration or payment of the 2013 Dividend is attributable to SHC.

10. SHC has no knowledge as to SCI's intent with respect to declaring and paying the 2013 Dividend.

The Monitor's Claim is Time Barred

11. Even if s. 96 could apply to the 2013 Dividend, which is expressly denied, the Monitor's claim is time barred. The 2013 Dividend was declared and paid long before the one year period provided for under s. 96 (1)(a)(i) of the BIA.

SHC was Not Privy to the 2013 Dividend

12. SHC was not a person that was privy to the 2013 Dividend under s. 96(3) of the BIA. Section 96(3) does not apply to shareholders in receipt of dividends. In any case, at all material times, including when the 2013 Dividend was declared and paid, SHC dealt at arm's length with SCI and its Directors.

13. The Defendant, Sears Holdings Corporation, 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
Corporation

TO: **NORTON ROSE FULBRIGHT CANADA LLP**

Royal Bank Plaza, South Tower
Suite 3800
200 Bay Street, P.O. Box 84
Toronto, ON M5J 2Z4

Orestes Pasparakis (36851T)

Email: orestes.pasparakis@nortonrosefulbright.com
Tel: (416) 216-4815

Robert Frank (35456F)

Email: robert.frank@nortonrosefulbright.com
Tel: (416) 216-6741

Evan Cobb (55787N)

Email: evan.cobb@nortonrosefulbright.com
Tel: (416) 216-1929

Tel: (416) 216-4000
Fax: (416) 216-3930

Lawyers for the Plaintiff, FTI Consulting Canada Inc.,
as Court-Appointed Monitor

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,
Edward S. Lampert, ESL Investments Inc., and ESL Partners, LP

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,
William Crowley and William Harker

FTI CONSULTING CANADA INC. in its capacity as
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SEARS HOLDINGS CORPORATION. et al.

Defendants

Court File No. CV-18-00611219-00CL

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PROCEEDING COMMENCED AT TORONTO

STATEMENT OF DEFENCE OF THE DEFENDANT,
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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