Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ELECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC. INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMTIED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC. and 3339611 CANADA INC.

(each an "**Applicant**") and collectively the "**Applicants**")

MOTION RECORD

(MOTION RETURNABLE JANUARY 22, 2018)

January 16, 2018

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TO: THE SERVICE LIST ATTACHED AT TAB D

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TAB A

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(each an "**Applicant**") and collectively the "**Applicants**")

NOTICE OF MOTION

THE MOVING PARTY, 1291079 Ontario Limited ("**129 Ontario**"), will make a motion before the Honourable Mr. Justice Hainey on January 22, 2018 at 10:00 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

THE PROPOSED METHOD OF HEARING: The motion will be heard orally.

THE MOTION IS FOR:

1. An Order, substantially in the form attached as Schedule "A", *inter alia*:

a. If necessary, an Order that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

b. Appointing Sotos LLP and Blaney McMurtry LLP as representative counsel to represent the interests of the Hometown Dealers (as defined below) in the claims process under the Claims Procedure Order (as defined below) ("**Representative Counsel**");

c. Appointing MNP LLP ("**MNP**") as advisor to the Hometown Dealers (as defined below) with respect to any issues relating to the valuation or quantification of the Omnibus Claim (as defined below) advanced by the Hometown Dealers in the Applicants' claims process;

d. Directing that the reasonable expenses and fees of MNP be paid from the estate of the Applicants, which fees shall be repaid to the estate from any distribution made to the Hometown Dealers as a result of the Omnibus Claim being accepted in the Applicants' claims process;

e. Granting a charge in favour of MNP on the Property (as defined in the Amended and Restated Initial Order) of the Applicants as security for the fees and disbursements payable to MNP, which shall not exceed an aggregate amount of $250,000.00 ("**MNP Charge**"); and

f. In addition, directing that the MNP Charge shall rank subsequent in priority to the Directors' Subordinated Charge (as defined in the Amended and Restated Initial Order);

2. Leave, if necessary, to bring the within motion;

3. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS for the motion are:

Background

4. The Applicant, Sears Canada Inc. ("**Sears Canada**"), had a network of dealers who independently owned and operated Sears Hometown stores ("**Hometown Dealers**");

5. Hometown Dealers operated in small towns and rural areas across Canada that lacked the population to support a full-line department store. They sold items such as major appliances, furniture, mattresses and outdoor equipment;

6. The relationship between each Hometown Dealer and Sears Canada is governed by the terms and conditions of a dealer agreement ("**Dealer Agreement**");

7. Under the Dealer Agreements, the Hometown Dealers were responsible for paying the operating expenses relating to the business, including insurance, employees, lease costs and certain furniture, fixtures and equipment, and were paid a commission by Sears Canada;

8. On or about July 5, 2013, 129 Ontario initiated a proceeding under the *Class Proceedings Act, 1992*, against Sears Canada seeking to certify a class action on behalf of the Hometown Dealers ("**Hometown Dealers Class Action**");

9. The Hometown Dealers Class Action alleges, *inter alia*, that the Dealer Agreements create a franchisor-franchisee relationship between the Hometown Dealer and Sears Canada; that Sears Canada did not fulfill its disclosure obligations under provincial franchise legislation, including the *Arthur Wishart Act (Franchise Disclosure), 2000* ("**Wishart Act**"); and that Sears Canada breached its statutory and common law obligation of good faith and fair dealing in its operation of the Hometown Dealer network. The plaintiff claims damages on its own behalf and on behalf of the Hometown Dealers in the amount of $100,000,000.00 for, *inter alia*, breach of contract, negligent misrepresentation, and breach of sections 3 and 7 of the Wishart Act;

10. The Hometown Dealers Class Action was certified by the Honourable Justice Gray on September 8, 2014;

11. The class is defined as all corporations, partnerships and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement at any time from July 5, 2011 to March 17, 2015, being the date on which the notice of certification was sent (the "**Class**");

12. 129 Ontario was appointed representative plaintiff of the Class;

13. There are 351 members of the Class;

Applicants' CCAA Proceedings

14. On June 22, 2017, the Applicants obtained protection under the *Companies' Creditors Arrangement Act* ("**CCAA**"), pursuant to the Order of the Honourable Justice Hainey ("**Initial Order**");

15. FTI Consulting Canada Inc. was appointed Monitor of the Applicants ("**Monitor**");

16. The Initial Order was amended and restated on the comeback motion on July 13, 2017 ("**Amended and Restated Initial Order**");

17. The Amended and Restated Initial Order provides for the establishment and priority of certain Charges (as defined therein), with the Directors' Subordinated Charge ranking behind all other Charge;

18. As a result of the CCAA proceeding, the Hometown Dealers Class Action has been stayed;

19. As at April 29, 2017, there were 65 Hometown Stores remaining. Fourteen of those Hometown stores were identified for closure and liquidation in the Applicants' initial application record, and have since been liquidated and closed during the pendency of the CCAA proceedings;

20. On October 13, 2017, the Court ordered the liquidation of all of its remaining stores and assets, including the Hometown stores and their merchandise, furniture, fixtures and equipment. All Hometown stores are set to be liquidated and closed on or before January 21, 2018;

21. On December 8, 2017, the Court issued the Claims Procedure Order setting out the procedures to be followed for the filing and determination of claims against the Applicants ("**Claims Procedure Order**");

22. Under the Claims Procedure Order, the claims bar date is March 2, 2018;

Appointment of Representative Counsel

23. The Hometown Dealers Class Action has already been certified as a class proceeding;

24. For consistency and efficiency in the CCAA proceedings, and to ensure that the interests of all Hometown Dealers are protected in the claims process, 129 Ontario is seeking the appointment of Representative Counsel;

25. Given the vulnerability and resources of the Hometown Dealers, the social benefit to be derived from the representation, and the facilitation of the proceedings, it is fair and just to appoint Representative Counsel;

Appointment of MNP

26. 129 Ontario has retained the services of MNP on behalf of the Class with respect to issues relating to the Claims Procedure Order. In particular, MNP's mandate involves:

    a. assisting counsel in the preparation of a questionnaire for all Hometown Dealers in the Class to establish the types and quantum of claims of individual Dealers, including requests for financial information, lease obligations, owner salaries and efforts to mitigate damages;

b. seeking the production of information and records from Sears Canada relating to the Hometown Dealers, including sales volumes and commissions paid;

c. analyzing the financial statements of Hometown Dealers and other information and documents relating to their business and earnings;

d. researching industry financial benchmarks to determine a reasonable expectation of return on investment for the Hometown Dealers;

e. analyzing industry, economic and other factors affecting the business operated by the Hometown Dealers, as applicable; and

f. developing a matrix for the quantification of claims for damages advanced by the Class in accordance with the Claims Procedure Order;

27. Based on its investigations and review of the information provided, MNP will formulate a claim on behalf of the Hometown Dealers taking into consideration the various metrics associated with each type of damage claim, as well as the Hometown Dealers' operations, revenues and cost structures. MNP will assist the Class in preparing and advancing a comprehensive and evidence-based omnibus claim submission ("**Omnibus Claim**") in the Applicants' claims process;

28. Given the complexity of the Dealer Agreements and the damages being sought in the Home Dealers Class Action, the Class cannot effectively advance the Omnibus Claim in these CCAA proceedings without the assistance of MNP. The appointment of MNP promotes access to justice for the Class;

29. Appointing MNP as an advisor on behalf of the Class will ensure that the Omnibus Claim is pursued efficiently and in a cost effective manner. Absent the Omnibus Claim (which consolidates the Hometown Dealers' damages claims), the Applicants and the Monitor may have to deal with the valuation of the Hometown Dealers' claims on an individual basis;

30. Given the number of Hometown Dealers, their geographic dispersion, the complexity of the Hometown Dealers' potential damages claims and the relatively short anticipated timeframe in which to assemble and formulate the Omnibus Claim, it is critical that MNP be appointed as soon as possible in order to ensure that is has sufficient time to complete its mandated;

31. The Class has retained counsel to prosecute the Home Dealers Class Action on a contingency basis, and cannot otherwise afford to pay the reasonable fees and disbursements of MNP out-of-pocket. MNP cannot be paid on a contingency basis;

32. It is fair and equitable for the reasonable fees of MNP to be paid from the Applicants' estate. These fees will be repaid to the estate from the distributions made to the Class if the Omnibus Claim is ultimately accepted by the Applicants and the Monitor or otherwise settled or determined to result in a provable claim in accordance with the Claims Procedure Order;

MNP Charge

33. It is fair and reasonable to grant the MNP Charge in the circumstances. The amount of the MNP Charge is fair and reasonable given the breadth of MNP's mandate, the size of the Class, and the complexity of the issues being advanced;

34. Section 11.52(1)(c) of the CCAA provides the Honourable Court with jurisdiction to grant a charge for the fees and expenses of financial, legal and other experts engaged by any interested person if the Court is satisfied that the security is necessary for their effective participation in the CCAA proceedings;

35. The Class is a creditor in these proceedings, and the MNP Charge is necessary to allow the Class to advance its Omnibus Claim against the Applicants under the Claims Procedure Order;

36. It is contemplated that the MNP Charge will be subordinate to all other Charges set out in the Amended and Restated Initial Order;

37. All secured creditors were provided with notice of this motion;

38. The provisions of the CCAA, including s. 11, and the inherent and equitable jurisdiction of this Honourable Court;

39. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING documentary evidence will be used at the hearing of the motion:

(1) The Affidavit of Jerry Henechowicz, sworn January 15, 2018;

(2) The Affidavit of James Kay, sworn January 15, 2018;

(3) Such further and other evidence as counsel may advise and this Honourable Court may permit.

January 16, 2018

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TO: THE ATTACHED SERVICE LIST

SCHEDULE "A"

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	**)**	MONDAY, THE 22ND
	)	
JUSTICE HAINEY	**)**	DAY OF JANUARY, 2018

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

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(each an "**Applicant**") and collectively the "**Applicants**")

ORDER

THIS MOTION, made by 1291079 Ontario Limited ("**129 Ontario**"), for an Order, *inter alia*: (a) appointing Sotos LLP and Blaney McMurtry LLP as representative counsel to represent the interests of the Class (as defined below); (b) appointing MNP LLP ("**MNP**") as financial advisor for the Class (as defined below) with respect to any issues relating to the valuation or quantification of the claim to be advanced by the Class in the Applicants' claims process; (c) directing that the reasonable fees and expenses of MNP be paid from the Applicants' estate; and (d) granting a charge in favour of MNP in the amount of $250,000, was heard this day, at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of 129 Ontario and on hearing the submissions of counsel for 129 Ontario, the Applicants, and FTI Consulting Canada Inc. in its capacity as Court-appointed monitor for the Applicants ("**Monitor**"), and such other counsel listed on the Counsel Slip, no one else appearing although duly served as appears from the affidavit of ●, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record is hereby abridged and validated so that the Motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT OF REPRESENTATIVE COUNSEL

2. **THIS COURT ORDERS** that Sotos LLP and Blaney McMurtry LLP ("**Representative Counsel**") are hereby appointed as representative counsel to represent the interests of all corporations, partnerships, and individuals carrying on business as a Hometown Dealer (as defined in the Motion Record of 129 Ontario) pursuant to a standard dealer agreement with Sears Canada Inc. ("**Class**") with respect to advancing a claim on behalf of the Class pursuant to the Claims Procedure Order, dated December 8, 2017 ("**Purpose**")

3. **THIS COURT ORDERS** that the Applicants shall provide to Representative Counsel, subject to confidentiality arrangements satisfactory to the Applicants and the Monitor, without charge, the following information, documents and data ("**Information**") to only be used for the Purpose in the context of these CCAA proceedings,

a) The names, last known addresses and last known telephone numbers and e-mail addresses (if any) of members of the Class; and

b) Upon the request of Representative Counsel, such documents and data as may be reasonably relevant to matters relating to the issues affecting the Class in these CCAA proceeding provided that such Information is to be only used for the Purpose;

and that, in doing so, the Applicants are not required to obtain express consent from members of the Class authorizing disclosure of the Information to Representative Counsel for the Purpose, and further, in accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act*, this Order shall be sufficient to authorize the disclosure of the Information for the Purpose without the knowledge or consent of individual members of the Class.

APPOINTMENT OF MNP

4. **THIS COURT ORDERS** that MNP is hereby appointed as financial advisor for 129 Ontario on its own behalf and on behalf of the Class to assist the Class and Representative Counsel in furtherance of the Purpose.

5. **THIS COURT ORDERS** that MNP shall be paid its reasonable fees and disbursements at its standard rates and charges, whether incurred prior to or subsequent to the date of this Order, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of MNP on a weekly basis and, in addition, are hereby authorized to pay to MNP a retainer in the amount of $50,000, to be held by MNP as security for payment of its fees and disbursements outstanding from time to time.

6. **THIS COURT ORDERS** that any payments made by the Applicants to MNP as set out in paragraph 3 shall be repaid to the Applicants from the distributions that would otherwise be payable to the Class on the basis of the Claim (as defined in the Claims Procedure Order, dated December 8, 2017) submitted by the Class in accordance with the Claims Procedure Order, dated December 8, 2017.

7. **THIS COURT ORDERS** that the payments made by the Applicants pursuant to this Order do not and will not constitute preferences, fraudulent conveyances transfers of undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable laws.

MNP Charge

8. **THIS COURT ORDERS** that MNP shall be entitled to the benefit of and is hereby granted a charge on the Property (as defined in the Amended and Restated Initial Order, dated June 22, 2017), which charge shall not exceed an aggregate amount of $250,000, as security for its fees and disbursements payable pursuant to paragraph 3, above ("**MNP Charge**").

9. **THIS COURT ORDERS** that the filing, registration or perfection of the MNP Charge shall not be required, and that the MNP Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the MNP Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

10. **THIS COURT ORDERS** that the MNP Charge shall constitute a charge on the Property and shall rank junior in priority to the Charges set out in the Amended and Restated Initial Order,

dated June 22, 2017, and, for greater certainty, shall rank subsequent to the Directors' Subordinated Charge.

11. **THIS COURT ORDERS** that, subject to paragraph 7, the MNP Charge shall rank in priority to all other security interests, trusts (including constructive trusts), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (including without limitation any deemed trust that may be created under the Ontario *Pension Benefits Act*) (collectively, "**Encumbrances**") other than (a) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation that has not been served with notice of this Order; and (b) statutory super-priority deemed trusts and liens for unpaid employee source deductions.

GENERAL

12. **THIS COURT ORDERS** that Representative Counsel and MNP shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order or any subsequent Orders in these CCAA proceedings, save and except for liability arising out of gross negligence or wilful misconduct.

13. **THIS COURT ORDERS** that Representative Counsel shall be at liberty, and is hereby authorized, at any time, to apply to his Court for advice and directions in respect of its appointment or the fulfillment of its duties in carrying out the provisions of this Order or any variation of the powers and duties of Representative Counsel, which shall be brought on notice to all interested parties, unless this Court orders otherwise.

14. **THIS COURT ORDERS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order and in case, any which motion to be served within three (3) weeks of the date of this Order.

_____

TAB B

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

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(each an "**Applicant**") and collectively the "**Applicants**")

AFFIDAVIT OF JAMES KAY
(SWORN JANUARY 15, 2018)

I, JAMES KAY, of the Town of Woodstock, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am the President of 1291079 Ontario Limited ("**129**"), a creditor of the estate of the Applicants. 129 is the representative plaintiff in a class action certified under the *Class Proceedings Act, 1992* against the Applicant, Sears Canada Inc. ("**Sears Canada**"). I have personal knowledge of the matters stated in this affidavit, except where I have acquired such information from others or from documents attached hereto, in which case I believe such information to be true.

2. This affidavit is sworn in support of a motion seeking to: (i) appoint MNP LLP ("**MNP**") as financial advisor to the Hometown Dealers (as hereinafter defined); (ii) direct that the reasonable expenses and fees of MNP be paid from the estate of the Applicants; and (iii) expand the definition of the "Class" (as hereinafter defined) in the class action.

A. The Class Action

3. On July 5, 2013, 129 initiated a proceeding under the *Class Proceedings Act, 1992*, against Sears Canada ("**Hometown Dealers Class Action**"). A copy of the Fresh as Amended Statement of Claim in the Hometown Dealers Class Action is attached hereto as Exhibit "1".

4. The Honourable Justice Gray certified the Hometown Dealers Class Action as a class proceeding on September 8, 2014. Copies of the certification reasons for decision and certification order are attached as Exhibits "2" and "3", respectively.

5. The action was certified on behalf of all corporations, partnerships and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement at any time from July 5, 2011 to March 17, 2015 (the "**Class**" or "**Hometown Dealers**"). There are 351 members of the Class.

6. The Hometown Dealers are independent businesses that operated in small towns and rural areas across Canada. Their relationship with Sears Canada was governed by Dealer Agreements (which are alleged to be 'franchise agreements' within the meaning of provincial franchise legislation) that had two fundamental characteristics - they gave Sears Canada the unilateral and discretionary right to set dealer revenue levels, and they made Hometown Dealers responsible for all costs and risks of their business.

7. Hometown Dealers primarily earned revenue through commissions paid by Sears Canada for products sold at a Hometown Dealers store. Most of the products that Sears Canada sold at Hometown stores were on consignment. Proceeds from sales flowed directly to Sears Canada and Hometown Dealers subsequently received a commission. Each category of item offered (for example, major appliances, furniture) had a set commission rate. Hometown Dealers could also earn other commissions for catalogue sales, or sales made at other retail locations or through a direct channel that are picked up at the Hometown store.

8. Under the Dealer Agreements, the Hometown Dealers were responsible for paying the operating expenses relating to the business, including insurance, employees, lease costs and certain furniture, fixtures and equipment.

9. The essence of the Hometown Dealers Class Action is as follows: Sears used its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieved exceptionally high, and generally unattainable, revenues. The principal of the average dealer labours 50-60 hours per week in its store for the equivalent of minimum wage and received no return on its investment. Many dealers could not afford to pay their principal any wage at all.

10. The Hometown Dealers Class Action alleges that the Dealer Agreement creates a franchisor-franchisee relationship between the Hometown Dealer and Sears Canada that is subject to the *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c 3 ("**Wishart Act**") and other similar provincial franchise legislation.

11. As such, there is a statutory duty of "fair dealing" in the performance and enforcement of the Dealer Agreement pursuant to section 3 of the Wishart Act. The Hometown Dealers Class Action alleges that Sears Canada had duties, both under the Wishart Act and at common law, to deal fairly and act in good faith towards the Hometown Dealers in the way it exercised its discretion to set compensation for the Hometown Dealers. The Hometown Dealers Class Action alleges that Sears Canada breached the Dealer Agreement and its duties in how it performed its obligations under the Dealer Agreement by:

(a) setting and maintaining a compensation structure that results in the vast majority of Hometown Dealers being unable to make a living wage from the business, let alone realize a return on its investment and efforts;

(b) cannibalizing sales in the Hometown Dealer's market area by selling goods directly to customers in corporate stores, over the internet and telephone (and offering incentives to do so) and shipping those goods directly to the customer, bypassing the Hometown Dealer and avoiding paying compensation to the Hometown Dealer for sales in the dealer's 'Market Area' as defined under the Dealer Agreement;

(c) charging and retaining for itself an unauthorized "handling fee" on all goods purchased online or by telephone and shipped to the Dealer's store, thereby directing sales away from the Dealer stores; and

(d) introducing new programs superficially designed to be revenue neutral, but that in fact claw back for many Hometown Dealers what little economic benefits the program delivers to the dealers.

12. In addition, the Hometown Dealers Class Action alleges that, starting in 2014, Sears Canada failed in its duties to reasonably support and protect the Hometown Dealer network by cutting financial support and personnel directly supporting the Hometown store network.

13. The Hometown Dealers Class Action also alleges that Sears Canada breached the obligation under section 5 of the Wishart Act to deliver a disclosure document to any dealer before that dealer entered into a Dealer Agreement, entitling the Hometown Dealers to damages for statutory misrepresentation under section 7 of the Wishart Act. Instead of disclosing the truth about the economics of the network as would be required in a disclosure document, it provided a common information package to prospective Hometown Dealers which touted the Hometown store system as "brilliant," "better than a franchise," and a "smart business model."

14. As a result of these breaches, the Hometown Dealers claim damages in the amount of $100,000,000.00 for breach of contract and breach of sections 3, 5 and 7 of the Wishart Act.

B. The Oppression Action

15. In addition to the Hometown Dealers Class Action, on October 21, 2015, 129 commenced a class proceeding against Sears Canada, its directors and its parent companies alleging oppression contrary to the *Canada Business Corporations Act* (the "**Oppression Action**"). A copy of the statement of claim in the Oppression Action is attached as Exhibit "4".

16. The Oppression Action relates to the payment of a $500 million extraordinary dividend by Sears Canada on December 6, 2013 (the "**Extraordinary Dividend**"). The Oppression Action alleges that the payment of the Extraordinary Dividend came at a time when Sears Canada was heading towards an inevitable insolvency filing.

17. The Extraordinary Dividend followed steps taken by Sears Canada in 2013 to liquidate many of its most valuable assets, including hundreds of millions of dollars realized by giving up valuable below-market long-term leases in prime Canadian shopping centres such as Toronto's Eaton Centre and Yorkdale Shopping Centre. The primary beneficiaries of the Extraordinary Dividend were Sears Canada's American parent corporations, Sears Holding Corporation and ESL Investments Inc. Sears Canada's directors elected to pay out the Extraordinary Dividend to Sears Holding Corporation and ESL Investments Inc.

18. After the declaration of the Extraordinary Dividend on November 19, 2013 but prior to its payment on December 6, 2013, class counsel in the Hometown Dealers Class Action wrote to counsel for Sears Canada requesting assurances that, having regard to the assets, liabilities (existing and contingent) and actual and likely future operating losses of Sears Canada, it had set aside a sufficient reserve to satisfy a judgment against Sears Canada should the Hometown Dealers Class Action be certified and succeed on the merits. No answer was provided.

19. On December 3, 2013, class counsel wrote to each director to put them on notice that should Sears Canada be unable to satisfy an eventual judgment against Sears Canada in the Hometown Dealers Class Action, that each director who authorized the Extraordinary Dividend may be jointly and severally liable with Sears Canada for such damages. A copy of this letter is attached as Exhibit "5". No answer was provided and Sears Canada subsequently paid out the Extraordinary Dividend.

20. Sears Canada's financial performance deteriorated following the payment of the Extraordinary Dividend.

21. The claim seeks damages from Sears Canada, Sears Holding Corporation, ESL Investments Inc. and each director that authorized the Extraordinary Dividend for conduct contrary to the *Canada Business Corporations Act*.

C. Applicants' CCAA Proceedings

22. On June 22, 2017, Sears Canada obtained protection under the *Companies' Creditors Arrangement Act* ("**CCAA**"), pursuant to the Order of the Honourable Justice Hainey ("**Initial Order**").

23. As a result of the CCAA proceeding, the Hometown Dealers Class Action has been stayed.

24. To the best of my knowledge, as at April 29, 2017, there were 65 Hometown Stores remaining. Fourteen of those Hometown Dealer stores were identified for closure and liquidation in the Applicants' initial application record, and have since been liquidated and closed during the pendency of the CCAA proceedings.

25. On October 13, 2017, the Court ordered the liquidation of all of Sears Canada's remaining stores and assets, including the merchandise, furniture, fixtures and equipment owned by Sears Canada at the remaining Hometown Dealer stores. All Hometown Dealer stores are set to be liquidated and closed on or before January 21, 2018.

26. On December 8, 2017, the Court issued the Claims Procedure Order setting out the procedures to be followed for the filing and determination of claims against the Applicants ("**Claims Procedure Order**").

27. Under the Claims Procedure Order, the claims bar date is March 2, 2018.

D. Appointment of MNP

28. 129 Ontario has retained the services of MNP on behalf of the Class with respect to issues relating to the Claims Procedure Order. In particular, MNP's mandate involves:

(a) assisting counsel in the preparation of a questionnaire for all Hometown Dealers in the Class to establish the types and quantum of claims of individual Hometown Dealers, including requests for financial information, lease obligations, owner salaries and efforts to mitigate damages;

(b) seeking the production of information and records from Sears Canada relating to the Hometown Dealers, including sales volumes and commissions paid;

(c) analyzing the financial statements of Hometown Dealers and other information and documents relating to their business and earnings;

(d) researching industry financial benchmarks to determine a reasonable expectation of return on investment for the Hometown Dealers;

(e) analyzing industry, economic and other factors affecting the business operated by the Hometown Dealers, as applicable; and

(f) developing a matrix for the quantification of claims for damages advanced by the Class in accordance with the Claims Procedure Order.

29. MNP will assist the Class in preparing and advancing a comprehensive and evidence-based omnibus claim submission ("**Omnibus Claim**") in the Claims Procedure Order. It is anticipated that the Omnibus Claim will cover three types of damages claims:

(a) damages for the breach of obligations under the Dealer Agreement, including the asserted obligation to exercise contractual discretion in accordance with the common law duty of good faith and in accordance with the statutory duty of fair dealing under the Wishart Act;

(b) statutory misrepresentation damages under the Wishart Act, including damages for loss of profits/opportunity caused by the misrepresentation/failure to disclose, and in particular, sections 5 and 7 of the Wishart Act; and

(c) damages from the termination of the Dealer Agreement under the CCAA proceedings for the remaining 49 Hometown Dealers.

30. The Class is a creditor in these proceedings, and the MNP charge is necessary to allow the Class to advance its Omnibus Claim against the Applicants under the Claims Procedure Order.

31. Given the complexity of the Dealer Agreements and the damages being sought in the Hometown Dealers Class Action, the Class cannot effectively advance the Omnibus Claim in these CCAA proceedings without the assistance of MNP. The appointment of MNP promotes access to justice for the Class.

32. Appointing MNP as a financial advisor on behalf of the Class will ensure that the Omnibus Claim is pursued efficiently and in a cost-effective manner. Absent the Omnibus Claim (which will consolidate the Hometown Dealers' damages claims), the Applicants and the Monitor may have to deal with the valuation of hundreds of the Hometown Dealers' claims on an individual basis.

E. Funding of MNP

33. It would not be possible for 129 to pay the reasonable fees and disbursements of MNP out-of-pocket. 129 has retained counsel to prosecute the Hometown Dealers Class Action on a contingency basis. MNP cannot be paid on a contingency basis.

34. As background, 129 began operating a Hometown store in June, 2007. During this time, my livelihood depended on being adequately compensated by Sears.

35. During its last few years of operation, 129 did not generate enough earnings to pay me even minimum wage for my full-time work as store manager.

36. The performance of 129 illustrates the dire situation faced by a typical Sears Hometown dealer. In 2012, after paying all expenses related to the business, 129 paid me $329 in total compensation for full-time work over the year. In 2013, 129 paid me $54,102, from which I paid down $48,000 on my and my spouse's personal line of credit which was used to finance the operations of 129 or against the personal loan taken out to purchase the shares of 129 in 2007. This left me with total net compensation of $6,102 for full-time work over the entire year.

37. Due to the unsustainable financial losses, 129 gave notice of termination of the Dealer Agreement in August, 2013 and the Dealer Agreement terminated effective December 14, 2013.

38. I have spoken with many other dealers who were in a similar financial predicament and were not earning even minimum wage from the operation of their respective Hometown store and, as a result, had to close their respective store. When the Hometown Dealers Class Action was commenced, there were approximately 260 Hometown Dealers in operation. As stated above, by April, 2017, the number had fallen

to approximately 65. It is my belief that it would not be possible for other class members to pay the reasonable fees and disbursements of MNP out-of-pocket.

39. Given the number of Hometown Dealers, their geographic dispersion, the complexity of the Hometown Dealers potential damages claims and the relatively short timeframe in which to assemble and formulate the Omnibus Claim, it is critical that MNP be appointed as soon as possible in order to ensure that it has sufficient time to complete its mandate.

40. It is fair and equitable for the reasonable fees of MNP to be paid from the Applicants' estate. It is proposed that these fees will be repaid to the estate from any distributions made to the Class if the Omnibus Claim is ultimately accepted by the Applicants and the Monitor or otherwise settled or determined to result in a provable claim in accordance with the Claims Procedure Order.

SWORN BEFORE ME at the City of Hamilton in the Province of Ontario on January 15th, 2018

Commissioner for Taking Affidavits

JAMES KAY

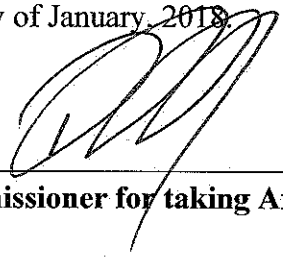
TAB 1

This is Exhibit **"1"** referred to in

the Affidavit of James Kay

sworn before me this 15 th

day of January, 2018.



A Commissioner for taking Affidavits

Court File No. 3769/13 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

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

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

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

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

AMENDED / MODIFIÉ
March 8 20 16
PURSUANT TO / CONFORMÉMENT A
Order of Justice Gray dated March 4 2016
LOCAL REGISTRAR / GREFFIER LOCAL
SUPERIOR COURT OF JUSTICE (ONTARIO)

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

July 5, 2013 Issued by M. TOMCZYK
Local Registrar

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

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

CLAIM

1. The plaintiff claims as against the defendant, Sears Canada Inc.:

(a) damages not exceeding $100,000,000 for:

(i) breach of contract;

(ii) breach of sections 3 and 7 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("**Wishart Act**");

(iii) breach of sections 7 and 9 of the *Franchises Act*, S.A. 1995, c. F-17 ("**Alberta Act**"), sections 3 and 7 of *The Franchises Act*, C.C.S.M., c. F156 ("**Manitoba Act**"), sections 3 and 7 of the *Franchises Act*, S.N.B. 2007, c. F-23.5 ("**NB Act**"), and sections 3 and 7 of the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1 ("**PEI Act**"), in respect of class members carrying on business in Alberta, Manitoba, New Brunswick and Prince Edward Island, respectively;

(iv) breach of articles 6, 7 and 1375 of the *Civil Code of Quebec,* S.Q. 1991, c. 64 ("**Civil Code**") in respect of class members carrying on business in Quebec;

or, alternatively, an order directing individual hearings in respect of such damages;

(b) further, and in the alternative, compensation and restitution for unjust enrichment in the amount of $100,000,000;

(c) an accounting of all products sold by either of the defendants through direct channels (as defined herein) and delivered directly to customers within each class member's defined market area since the inception of each class member's Dealer Agreement (as defined herein) and judgment in an amount equal to Retail Commissions (as defined herein) on all such sales;

(d) a mandatory order directing the defendants to pay to the class members Retail Commissions in respect of all products sold by either of the defendants through direct channels and delivered directly to customers within each class member's defined market area;

(e) an accounting of all commissions paid to each class member in accordance with section D of Schedule "A" to the Dealer Agreement since the inception of each class member's Dealer Agreement, and judgment for any shortfall arising therefrom;

(f) a declaration that the defendant is a "franchisor" within the meaning of the Wishart Act, Alberta Act, Manitoba Act, NB Act and PEI Act (collectively, the "**Franchise Acts**");

(g) a declaration that each class member is entitled to the benefit of the Wishart Act pursuant to the choice of law provision in the Dealer Agreement, and further that each class member carrying on business in Ontario, Alberta, Manitoba, New Brunswick and Prince Edward Island is entitled to the protection of the Franchise Act applicable in its province;

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

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

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

Summary of Claim

2. The class members comprise a network of approximately 260 "Sears Hometown" stores operating in every province and territory of Canada pursuant to a standard dealer agreement ("**Dealer Agreement**") with the Sears defendants. The Dealer Agreement is a franchise agreement within the meaning of the Franchise Acts, although Sears does not comply with any applicable franchise legislation.

3. Sears uses its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieves exceptionally high, and generally unattainable, revenues. The Hometown store program dooms dealers to financial ruin while Sears reaps the rewards of the dealers' hard work and investment. The principal of the average class member labours 50-60 hours per week in its store for the equivalent of minimum wage and receives no return on its investment. Many dealers cannot afford to pay their principal any wage at all. Sears is well aware that the Hometown store program is not economically viable for the dealers.

4. On the other hand, the Hometown store program is a very profitable distribution channel for Sears. Sears realizes high profit margins on sales made through the Hometown stores while downloading the high retail and handling costs onto the dealers who operate on a subsistence compensation model. Even though Sears maintains unilateral, discretionary power under the Dealer Agreement to adjust the dealers' financial compensation in order to make the Hometown store model a successful one for the dealers and Sears alike, Sears has ignored repeated pleas from the dealer body to exercise its discretion to increase compensation to a sustainable level. Instead, Sears squeezes ever more profit from the Hometown store program and leaves dealers to languish and then fail. After a dealer finally exhausts its resources and gives up its store, Sears reacquires and resells the store to a new dealer by misrepresenting the truth about the system.

5. Sears perpetuates this predatory scheme through a number of means. First, it conceals the economic reality about the Hometown store program from prospective dealers. It does so by disregarding provincial franchise disclosure laws designed, among other things, to provide full disclosure of all material facts related to the franchise system. Instead of disclosing the truth about the economics of the network, it provides a common information package to prospective dealers which touts the Hometown store system as "brilliant," "better than a franchise," and a "smart business model."

6. Once the dealer has signed the Dealer Agreement, often tying itself into a long-term lease, the exploitation of the dealer continues:

(a) Sears maintains a compensation structure that results in the vast majority of dealer-principals being unable to make a living wage from the business, let alone realize a return on its investment and efforts.

(b) Sears poaches sales in the dealer's market area by selling goods directly to customers over the internet and telephone and ships those goods directly to the customer, bypassing the dealer and avoiding paying compensation to the dealer for sales in the dealer's 'Market Area' as defined under the Dealer Agreement.

(c) Sears charges and retains for itself an unauthorized "handling fee" on all goods purchased online or by telephone and shipped to the dealer's store.

(d) Sears has introduced new programs superficially designed to be revenue neutral, but that in fact claw back for many dealers what little economic benefits the program delivers to the dealers.

7. Additonally, beginning in 2014, Sears has failed in its obligation to reasonably support and protect the Hometown store network by cutting financial support and personnel directly supporting the Hometown store network. Sears has exacerbated this failure by eroding the "Sears" brand in the public eye. It has done so by selling the leases for many of its prime corporate "Sears" locations and other cuts to the support of its retail business. These sales and cuts did not result in any funds being used to support or protect the Hometown store network, but were instead used to pay extraordinary dividends to Sears US-parent corporations.

8. Contrary to its duty of good faith and statutory duty of fair dealing, Sears carries out these acts solely to maximize its own profits, and in complete disregard of the dealers' economic well-being, reasonable commercial interests and contractual expectations.

9. Through these systemic actions, Sears has destroyed the right of dealers to enjoy the fruits of the Dealer Agreement and has deprived the dealers of the opportunity to fairly participate in revenues and profits generated by the Hometown store program.

Parties

10. The plaintiff, 1291079 Ontario Limited, is incorporated under the laws of Ontario and carries on business in the Town of Woodstock, Ontario, as a retailer under the "Sears Hometown" store program.

11. The defendant, Sears Canada Inc. ("**Sears**"), is incorporated under the federal laws of Canada and has its head office in the City of Toronto, Province of Ontario. Sears is one of Canada's largest retailers of home appliances, furnishings, mattresses, electronics and apparel, among other things.

12. In addition to Hometown stores, Sears owns and operates its own retail outlets, including full-line department stores and other smaller, specialty retail outlets. Sears also sells products to customers through catalogue ordering, telephone ordering though its 1-800 telephone number, and online through www.sears.ca (collectively, the "**direct channels**"). Sears distributes catalogues across Canada where customers can order goods from the catalogues, which are then either delivered directly to the customer or picked up

at a Sears retail outlet. Similarly, customers can order products directly from Sears online from Sears' website or through Sears' 1-800 telephone number for direct delivery or pickup at a Sears outlet.

13. At the end of 2012, there were approximately 260 Hometown stores, 118 full-line department stores, as well as other Sears retail stores.

14. The proposed class consists of all persons carrying on business as a Hometown store under a Dealer Agreement with Sears at any time on or after January 1, 2011 ("**dealers**" or "**class members**").

The Sears Hometown Store Program

15. Hometown stores typically offer for sale major appliances, furniture, home electronics, and outdoor power equipment among other things, and include a catalogue merchandise pick-up location. Most Hometown stores are located in small towns and more rural areas that lack the market size to support a full-line department store, which are generally located in large urban and suburban shopping centres.

16. Dealers do not pay any upfront fees to Sears to be part of the Hometown stores program, but must pay for the fixturing and design of their stores. Dealers are also responsible for securing a lease for the premises for the Hometown store and the costs of leasehold improvements. While Sears provides some of the equipment used in the operation of the Hometown store (such as the POS system so Sears can track sales), a dealer purchases all the other equipment and fixtures not provided by Sears. Typically, a

dealer is required to spend between $50,000 - $100,000 to get its Hometown store up and running in addition to its lease commitments.

17. Under the Dealer Agreement, with the exception of purchasing most inventory, a dealer is responsible for all expenses in running its Hometown store. The dealer is responsible for securing the premises, paying staff, utilities, and all other business expenses that are required to operate the Hometown store.

18. With respect to most inventory, according to the Dealer Agreement, the dealer acts as bailee for Sears, which places the inventory with the dealer on consignment. When an item is sold at the Hometown store, according to the Dealer Agreement, title to the inventory transfers directly from Sears to the customer and all payments for merchandise by the customer are the property of Sears. All credit card payments are directed to Sears. All cash payments are deposited into Sears' bank account.

19. Sears controls what merchandise is offered for sale at each Hometown store and at what price. A dealer has little input on what merchandise is sold at its Hometown store. Sears also controls what inventory is on display and the general layout of the Hometown store.

Dealer's Revenue Streams

20. A dealer does not earn revenue directly from the customers that shop at the Hometown store (except from the sale of parts and accessories, as to which see paragraph 72 below). Rather, Sears pays the dealer a commission for merchandise sold at the Hometown store. Each category of items offered (for example, major appliances) has a

set commission rate. On average, the commission paid by Sears is about 10% of the retail price of the merchandise (the "**Retail Commissions**"). Therefore, if a dealer sells $1,000,000 of merchandise at its Hometown store, Sears will pay the dealer approximately $100,000 in Retail Commissions.

21. In addition to Retail Commissions, a dealer earns 4.5% of the retail price of goods ordered through the direct channels that are picked-up at the dealer's Hometown store ("**Direct Channel Commissions**").

22. A dealer also earns a 3% commission of the retail price of goods if a catalogue order is made from the dealer's Hometown store ("**Catalogue Commissions**").

23. A dealer also earns $25 for an item that is purchased at another Sears' retail location (including other Hometown stores) and picked up at the dealer's Hometown store, and an additional $10 for each additional item in a multi-piece order ("**Retail Handling Commissions**").

24. Retail Commissions, Direct Channel Commissions, Catalogue Commissions and Retail Handling Commissions are hereinafter collectively referred to as "**commissions**" or "**compensation**".

25. The majority of a dealer's revenue comes from Retail Commissions.

26. If a customer cancels or returns an item purchased from the dealer's Hometown store, the dealer's commission is reduced by the commission originally paid on the sale

of the good without compensation for handling. The dealer is also responsible to pay Sears for unpaid goods in certain cases where a customer does not make proper payment.

Hometown Store Program Is Not Viable for Dealers

27. Hometown stores are a very profitable business segment for Sears. On the sale of a typical good at a Hometown store, Sears realizes a gross margin of approximately 36%. Out of that 36%, Sears pays the dealer approximately 10% for the Retail Commissions and keeps the remaining 26% for itself, despite the fact that virtually all of the costs of selling the good are borne by the dealer. Out of the dealer's 10% Retail Commissions, it must pay rent, employees, utilities and all other expenses needed to keep the Hometown store operating.

28. The effect of the Sears Hometown Program is that the vast majority of dealers barely earn enough commissions to cover their expenses and pay their principals minimum wage. Many dealers are unable to pay their principals more than a token amount for their 50-60 hour work week. Very few dealers generate enough income to pay their principals a living salary and earn a return on their investment. Many dealers hang on out of fear that by closing their store, they will be forced into bankruptcy due to lease obligations and employee obligations.

29. Sears, on the other hand, profits handsomely from the Hometown store program. By realizing an approximately 36% gross margin from the sale of goods (and even after covering its own expenses for distribution and maintaining the Hometown Sears program), the Hometown store program has been a huge boon to Sears' profitability

while the dealers struggle to stay in business and not lose their initial investment and be exposed to claims from landlords, employees and the like.

30. Sears knows that the Hometown store program is unsustainable for the dealers. After a dealer eventually runs out of money, Sears simply appoints a new dealer operator to run the Hometown store.

31. The commissions under the Dealer Agreement, which directly impact the viability of the dealer network, can be changed by Sears in its sole discretion on 90 days' notice to the dealers. Because of this unilateral discretion to change the commissions, Sears has a duty of good faith and a statutory duty of fair dealing under section 3 of the Wishart Act to exercise its discretion in a manner which is fair and commercially reasonable taking into account the interests of both Sears and the dealership network at large. Sears has instead breached such unilateral and discretionary powers by perpetuating a predatory system of under-compensation which forces dealer-principals to labour 50-60 hours per week in return for subsistence compensation which Sears knows is insufficient to meet their basic financial needs, and which provides no return on the dealers' financial investment and efforts.

32. Sears is fully aware of that the commissions structure of the Dealer Agreement is unsustainable and that Retail Commissions need to be increased to at least 15% of sales on average in order for the dealership network to be viable. However, instead of increasing commissions pursuant to its unilateral and discretionary powers, Sears has:

(a) *lowered* dealers' commission rates;

(b) unlawfully competed for sales by selling and shipping directly to customers within the dealers' market area through the direct channels without compensation to the dealers and offered lower prices through the direct channels while prohibiting dealers from price matching;

(c) implemented a handling fee on catalogue sales for its sole benefit and without sharing of such fee with the dealers who do the actual handling; and

(d) removed local store advertising subsidies and converted such advertising to national advertising.

33. Further particulars of these actions are provided in the following paragraphs.

(a) Lowering of dealers' commissions

34. In August 2012, Sears reduced the average Retail Commission rates paid to dealers.

35. Under the Dealer Agreement, Sears reserves the right to modify the Retail Commissions paid to dealers by providing no less than 90 days' written notice to the dealers. In light of the vulnerability of the dealers, whose only compensation are the commissions set by Sears, modifications to the Retail Commissions must be carried out fairly, in good faith and in accordance with reasonable commercial standards. Such modifications must also be made with proper motive and taking into account the dealers' reasonable expectations of profit.

36. At the same time, in order to offset the reduction in Retail Commissions, Sears introduced a 1% bonus commission if the customer purchases the item using a Sears-branded credit card (the "**Cardshare Program**"). Under the Cardshare Program, if a customer purchases an item at the Hometown store using its Sears' credit card, Sears pays the dealer a 1% bonus commission, in addition to the Retail Commission regularly paid on the sale of the item.

37. When Sears introduced the Cardshare Program, Sears represented to the dealers that the reduction in Retail Commissions would not have a negative effect on a dealer's commissions, and would result in an increase in revenue for the dealers. Sears sent to every dealer a customized report summarizing the net effects on total commission under the Cardshare Program.

38. Through the Cardshare Program, Sears encourages dealers to push customers to buy their products using the Sears' credit card. Sears does this because it has an agreement with the underwriter for the Sears credit card that pays Sears a substantial undisclosed rebate on goods bought using the Sears' credit card ("**Credit Card Rebates**"). Sears then uses a small part of the Credit Card Rebates to pay the dealer the 1% bonus under the Cardshare Program. A dealer has little control over whether a good is purchased using a Sears credit card other than to try to promote and encourage the use of the card. The change in Retail Commission has had a net negative effect on many dealers' revenue to the benefit of Sears.

39. Section 16.07 of the Dealer Agreement states: "[t]he Dealer **shall not be required to pay additional costs** for Sears established credit plans or approved third party credit plans" (Emphasis added).

40. The Credit Card Rebates is money that is properly payable to the dealers as the dealers are the merchants who transact with the customers. To the extent that such amounts would otherwise have been payable to the dealers but, through negotiation, Sears has directed the third party credit provider to pay such amounts to itself, then such amounts are "additional costs" and are in breach of section 16.07 of the Dealer Agreement.

41. Further, the lowering of Retail Commissions in August 2012 was an additional cost to the dealer for approved third-party credit plans in breach of section 16.07 of the Dealer Agreement.

42. The lowering of the Retail Commissions in August 2012 and the receipt of Credit Card Rebates by Sears, individually and together, in circumstances where Sears is aware that the Hometown dealer program is unsustainable for the dealers, have been carried out in complete disregard of the interests of the dealers and in a purely self-preferential manner by Sears. Such conduct is a breach of the duty of good faith and the statutory duty of fair dealing under the Wishart Act.

43. The Credit Card Rebates are not disclosed to a prospective dealer before it enters into the Dealer Agreement in a disclosure document or otherwise, contrary to section 5(4) of the Wishart Act and section 6(8) and the general regulation thereto, O. Reg. 581/00.

The dealers claim damages in respect of such non-disclosure under section 7 of the Wishart Act.

44. Further, and in the alternative, Sears has been unjustly enriched through the receipt of the Credit Card Rebates and the lowering of the Retail Commissions in August 2012.

45. Further, because the dealers are the merchants who transact with the customers directly as independent businesses, the Credit Card Rebates are ordinarily payable to them, but have been redirected through negotiation between Sears and the third-party credit card underwriters to be paid entirely to Sears. Accordingly, the Credit Card Rebates are indirect payments by the dealer to Sears or its associate within the definition of "franchise" under section 1(1) of the Wishart Act as discussed more fully below under the heading "Sears is a Franchisor under the Franchise Acts."

(b) Sears directly competes within dealers' market area

46. Sears undercuts the dealers' revenues by competing with Hometown stores through the direct channels and shipping directly to customers in the dealer's market area. Hometown stores are generally located in small towns or rural areas. Under section 4.01 of the Dealer Agreement, Sears reserves the right to "acquire, own, license, operate or authorize others to operate and advertise other Sears stores **physically located** within the [dealer's] Market Area," but only if, "in Sears [sic] sole discretion, acting reasonably, the Market Area can support such expansion" (emphasis added). "Market Area" is defined in the plaintiff's Dealer Agreement as Woodstock, Ontario.

47. Unlike with respect to the placement of physical stores, Sears did not reserve to itself the right to compete with the dealers' stores through the direct channels and direct-to-customer shipping. The Dealer Agreement does not permit Sears to compete in the dealer's Market Area using direct shipping though the direct channels. Despite this, Sears actively competes in the dealer's Market Area by selling through the direct channels and shipping directly to customers residing in the dealers' Market Area. Sears also sends promotional emails and flyers to customers in the dealer's Market Area encouraging them to order products through the direct channels. Sears does not pay commissions to the dealers in respect of direct channel sales shipped directly to a customer in the dealer's Market Area.

48. The effect of Sears competing through its direct channels has been a material decrease in dealers' revenues, as customers are increasingly purchasing products through the direct channels and Sears is actively encouraging them to do so.

49. In addition to unlawfully encroaching upon the dealers' Market Area, Sears undercuts the dealers through its online business by incentivizing the customer to buy the item online through such things as "free shipment" promotions, "daily deals" and other online promotions. This results in greater profits to Sears than if the customer bought from a dealer's store as it results either in lower commissions to be paid to the dealer (if the online customer picks up the product from the dealer's store), or bypasses the dealer completely if the product is shipped directly to the customer. If the customer returns to a dealer store a good purchased online that was shipped directly, the dealer store receives no compensation for handling.

50. Sears sells online directly into the dealers' Market Area. Sears competes through www.sears.ca.

51. The sale of products by Sears through direct channels shipped directly to customers in the dealers' Market Areas is a breach of the Dealer Agreement.

52. Alternatively, if Sears is permitted to compete in the dealer's Market Area through the direct channels by shipping directly to customers (which is strictly denied), then, by analogy to section 4.01 of the Dealer Agreement, Sears can only compete in the dealers' Market Area in such manner if it can reasonably establish that the Market Area can support such competition. Because the Hometown store program is, to Sears' knowledge, unsustainable for the dealers, Sears is not permitted to compete with the Hometown stores through its direct channels unless it pays full Retail Commissions to the dealers for all direct channel sales within the dealer's Market Area.

53. Further and in the alternative, by engaging in such competition, Sears has failed to take the dealers' reasonable commercial interests into account or comply with the duties of good faith and fair dealing, and has been unjustly enriched by not paying Retail Commissions to the dealer in respect of direct channel sales into its Market Area.

54. Accordingly, the dealers request a mandatory order requiring Sears to pay Retail Commissions to the dealers in respect of direct channel sales into its Market Area and an accounting of all direct channel sales into their Market Area since the inception of their respective Dealer Agreement.

(c) Sears imposes unlawful "handling fee" on catalogue sales

55. Sears charges a $3.95 flat "handling fee" for Hometown store customers that purchase items through a direct channel and choose to ship to a Hometown store for pick-up. Customers generally purchase items through a direct channel because the specific item is not offered for sale at the Hometown store.

56. Although it is the dealer which handles the item when the customer picks it up from the Hometown store, Sears keeps the entire handling fee for itself and does not share the fee with the dealer.

57. The effect of the handling fee is to discourage customers from having items purchased through a direct channel shipped to a Hometown store for pickup and to encourage customers to have the item shipped directly.

58. The handling fee is not permitted by the Dealer Agreement. Indeed, Sears highlights on its website page devoted to "Business Opportunities" for "Dealer Store Owners" that one of the benefits of the Hometown stores program is that there is "no merchandise shipping or handling fee." The imposition of the handling fee is a breach of the Dealer Agreement. Alternatively, the imposition of the handling fee in circumstances where Sears is aware that the dealer compensation is systemically inadequate constitutes a breach of the duties of good faith and fair dealing and/or unjust enrichment on the part of Sears.

59. Further, because the dealers handle the merchandise and transact directly with the customer, any handling fee is earned by the dealers, not by Sears. Because Sears directs the customer to pay the entire handling fee to Sears, the handling fees are indirect

payments by the dealer to Sears or its associate within the definition of "franchise" under section 1(1) of the Wishart Act as discussed more fully below under the heading "Sears is a Franchisor under the Franchise Acts."

(d) Removal of local store advertising subsidies

60. Pursuant to section 19.01 of the Dealer Agreement, Sears is required to share advertising costs undertaken by a dealer. Until August 2012, after a dealer performed local advertising, which included distributing flyers, placing radio ads or other forms of local advertising, the dealer would submit the invoice to Sears who would reimburse the dealer for 50% of the cost pursuant to section 19.01 and Part H of Schedule "A" of the Dealer Agreement.

61. As part of this local advertising, Sears would create, at its own cost, advertising templates for flyers that dealers could distribute. A dealer would only be required to pay for the distribution costs of the flyer (usually through the local newspaper) and Sears would reimburse 50% of the distribution costs.

62. Beginning in August 2012, Sears implemented fundamental changes to the local advertising reimbursement program. The changes included three components:

(a) With respect to flyers, Sears agreed to pay 100% of the production and distribution costs of a flyer. However, Sears maintained the discretion whether to distribute the flyer in a particular dealer's market area. If Sears did not distribute the flyer in the dealer's market area, the dealer would be responsible for 100% of the distribution costs;

(b) With respect to radio and newspaper ads, Sears agreed to pay 100% of producing radio scripts and the production of the newspaper advertisement. The dealer would then be responsible for 100% of the costs of running the radio or newspaper advertisements; and

(c) Periodically, Sears agreed to pre-approve various subsidies with respect to other local advertising, which a dealer was permitted to take advantage of. Otherwise, the dealer was required to request pre-approval from Sears for other local advertising, for which Sears would then decide whether to offer any reimbursement.

63. The net result of these changes is that dealers are now paying more for local advertising. Further, all of the flyers or advertising templates created by Sears for use by dealers are for national advertising and often include items that are not even offered for sale at the dealer's Hometown store. Such flyers also encourage customers to order through a direct channel and thereby completely bypass the dealers if products are shipped direct-to-customer. As such, in addition to the increase in direct costs placed on dealers through the changes to the advertising programs, Sears now charges dealers for what amounts to the right to advertise for Sears' other distribution channels. It is a detriment to the dealers to advertise products which are unavailable at their stores.

64. The changes initiated in August 2012 are a breach of section 19.01 and Part H of Schedule "A" of the Dealer Agreement. Alternatively, in circumstances where Sears is aware that the dealer compensation is systemically inadequate, such changes constitute a

breach of the duties of good faith and fair dealing and/or unjust enrichment on the part of Sears.

65. Further, to the extent that dealers are or were at any time under their current Dealer Agreements required to pay for:

(a) part or all of the advertising of items not generally offered for sale at Hometown stores, or

(b) advertising which, in whole or in part, constitutes national advertising,

such payments are or were indirect payments by the dealer to Sears or its associate within the definition of "franchise" under section 1(1) of the Wishart Act as discussed more fully below under the heading "Sears is a Franchisor under the Franchise Acts."

Sears is a Franchisor under the Franchise Acts

66. Throughout this statement of claim, any reference to a section in the Wishart Act shall mean and include such equivalent section in the other Franchise Acts, as applicable, in accordance with the following table:

Wishart Act section	**Manitoba Act, NB Act and PEI Act sections**	**Alberta Act section**
1(1)	1(1)	1(1)
3	3	7
5	5	4
7	7	9
11	11	17

67. The Sears Hometown dealer program meets the criteria of a "franchise" under section 1(1) of the Wishart Act, namely: (i) the sale of goods associated with the

franchisor's name; (ii) the exercise of significant control by the franchisor over the business of the franchisee, and (iii) direct or indirect payments by the franchisee to the franchisor or its associate. Each of these criteria is discussed in the following subparagraphs:

(a) **Sale of goods associated with the Sears name:** The Dealer Agreement grants the dealer the right to sell, offer for sale or distribute goods or services that are substantially associated with Sears' trade-mark, service mark, trade name, logo or advertising or other commercial symbols.

(b) **Significant control:** Sears exercises significant control over a dealer's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training. To take but a few examples, the dealer must carry only Sears products (s. 6.01); must sell products at the selling price determined by Sears (s. 6.09); must comply with Sears' operations manual (s. 5.08); and, may only advertise using approved advertising materials (s. 19.0); and

(c) **Payments to Sears or its associates:** The dealer is required by contract or otherwise to make direct or indirect payments to Sears or its associate in the course of operating the business or as a condition of acquiring the franchise or commencing operations. The types of payments which the dealer is required to make are set out in the following paragraphs.

(i) Consignment sale is indirect payment by dealer to Sears

68. Sears has structured the Dealer Agreement so that the payments required to be made by the dealer for inventory are ostensibly made by the retail customer directly to Sears. Using the artifice of a consignment contract, payment for inventory purchased from a dealer is deemed by the Dealer Agreement to be a payment made by the customer directly to Sears. Such payment, however, is for all intents and purposes an indirect form of payment of inventory by the dealer to Sears via the customer. Such payments qualify as indirect payments to Sears by the dealer in the course of operating the business and therefore satisfy the "payments" requirement under the definition of "franchise."

69. Although the Dealer Agreement states that title to the inventory does not pass to the dealer but passes directly from Sears to the retail customer, Section 26 of the Dealer Agreement reveals that transactions between the dealer and its customer are made by the dealer as principal and not as a mere agent or bailee of Sears. Section 26 provides, among other things:

a. "The Dealer agrees that all purchases and contracts, made by it in connection with the operation of the Dealer Store and this Agreement shall be made solely in the name of the Dealer…"

b. "The Dealer further agrees not to do any act or make any statement that may imply that the Dealer or the Dealer Store is a branch of Sears or, that Sears in any manner owns, controls or operates the Dealer Store or, that any relationship exists between Sears and the Dealer other than that of the Dealer being an independent contractor of Sears."

c. "Nothing in this Agreement shall be construed to create a partnership, joint venture or agency relationship between Sears, Sears Roebuck, the Dealer, the Guarantor or any agent, employee or affiliate of the Dealer. The parties agree that the Dealer is an independent contractor."

d. "the Dealer must clearly display on or near the principal entrance of to the Dealer Store a decal provided by Sears, which states 'SEARS AUTHORIZED RETAIL DEALER independently owned and operated by [dealer name]'".

70. Pursuant to sections 16.10 and 16.11 of the Dealer Agreement, the dealer is responsible to pay Sears for unpaid goods in certain cases where a customer does not make proper payment.

71. Such provisions indicate that the dealer transacts the sale of goods with its customer in its own name, as principal and not as agent. The consignment provisions in the Dealer Agreement are a transparent attempt to avoid the application of the Wishart Act. The plaintiff pleads and relies on section 11 of the Wishart Act to the extent that such provisions would otherwise have the effect of depriving the class members of their rights under the Wishart Act.

(ii) Purchase of products by dealer from Sears are direct payments

72. In addition to taking inventory ostensibly on consignment, dealers are required to purchase certain inventory, primarily parts and accessories, directly from Sears. The dealer must purchase such parts and accessories only from Sears pursuant to section 6.01 of the Dealer Agreement (unless Sears authorizes a dealer to purchase from a person

other than Sears). Such purchases constitute direct payments by the dealer to Sears within the meaning of section 1(1) of the Wishart Act.

(iii) Credit Card Rebates are indirect payments by the dealer to Sears

73. As stated in paragraph 45 above, Credit Card Rebates are indirect payments by the dealer to Sears or its associate.

(iv) Handling fees are indirect payments by the dealer to Sears

74. As stated in paragraph 59 above, handling fees are indirect payments by the dealer to Sears.

(v) Advertising payments are indirect payments by the dealer to Sears

75. As stated in paragraph 65 above, to the extent that the dealers pay for advertising which is, for all intents and purposes, national advertising, such payments are indirect payments by the dealer to Sears or its associate.

76. Accordingly, the Dealer Agreement is a "franchise agreement" within the meaning of the Wishart Act.

77. All class members are entitled to the protection of the Wishart Act pursuant to the choice of law in section 33.01 of the Dealer Agreement.

78. Alternatively, all class members carrying on business in Ontario, Alberta, Manitoba, New Brunswick and Prince Edward Island are entitled to the protection of their province's respective Franchise Act.

Breach of Duties of Good Faith and Fair Dealing

79. Sears is a "franchisor" within the meaning of the Wishart Act.

80. Sears owes the class members a duty of fair dealing in the performance and enforcement of the Dealer Agreement under section 3 of the Wishart Act.

81. Further and in the alternative, Sears owes a duty of utmost good faith in the performance and enforcement of the Dealer Agreement particularly in the exercise of all discretionary rights affecting dealer compensation. Further, Sears owes dealers in the Province of Quebec a duty of good faith in the performance of its obligations under the Dealer Agreement pursuant to articles 6, 7 and 1375 of the Civil Code.

82. The Dealer Agreement grants Sears the discretion to modify the commissions under the Hometown store program. Such discretionary rights must be exercised not solely for Sears' goal of profit maximization, as it has done, but in order to maintain a dealership network that fairly compensates both Sears and the dealers for their respective investments of labour and capital.

83. Sears' contractual rights and obligations must be considered and applied in light of the vulnerability and the dependence of dealers, who, by virtue of the Dealer Agreement, sell only the products that Sears provides them at prices set by Sears, and whose compensation is set by Sears.

84. Sears' contractual rights to set and modify dealer compensation imposes an obligation on it to set and maintain commission rates that afford the dealers a reasonable

opportunity to pay their expenses including a reasonable salary for their dealer-principals and realize a reasonable return on their investment. By refusing to do so, Sears has breached the Dealer Agreement including the duty to perform its obligations thereunder in good faith and has breached the statutory duty of fair dealing under the Wishart Act.

85. Sears has a continuing duty to act reasonably, and to adjust dealer compensation, including Retail Commissions, to reflect the economic realities in which the dealers operate. Sears cannot use its unilateral and discretionary powers to condemn the dealers to a compensation structure which Sears itself has acknowledged is "broken" and unsustainable for the dealers while Sears itself realizes significant profits from the Hometown stores system.

86. In carrying out its discretionary powers in respect of dealer compensation, Sears has acted with improper motive and without taking the dealers' reasonable commercial interests and contractual expectations into account by:

(a) maintaining a compensation structure that results in the vast majority of dealers working for subsistence compensation and not realizing any return on their investment and sweat equity;

(b) introducing new programs such as the Cardshare Program superficially designed to be revenue neutral to the dealers, but that, in fact, further claw back what little economic benefits the program delivers to the dealers;

(c) unlawfully competing in the dealers' Market Areas through direct channel sales shipped directly to the customer as pleaded above;

(d) receiving the Credit Card Rebates as pleaded above;

(e) charging an unauthorized "handling fee" on all direct channel sales shipped to the dealer's store as pleaded above; and

(f) clawing back payments for local advertising as pleaded above.

87. In so doing, Sears has breached the Dealer Agreement including the duty to perform its obligations thereunder in good faith, has breached the statutory duty of fair dealing under the Wishart Act, and has acted contrary to the duties contained in articles 6, 7 and 1375 of the Civil Code.

Breach of Statutory Disclosure Obligations

88. Sears is required under the Wishart Act to deliver to prospective dealers a statutorily prescribed disclosure document at least 14 days before a dealer signs any agreement or pays any money related to a Hometown store dealership.

89. The disclosure obligations under the Wishart Act apply to all class members pursuant to the choice of law provision in section 33.01 of the Dealer Agreement.

90. Alternatively, the disclosure obligations under the Franchise Acts apply to all class members carrying on business in the province in which the respective Franchise Act applies.

91. The disclosure document required under each of the Franchise Acts must contain complete and truthful information about the franchise system, supported by a certificate signed by two of Sears' officers or directors. The purpose of the disclosure document is

to ensure that a franchisee can decide whether to enter into the proposed franchise agreement with full and complete information.

92. Sears has failed to provide a disclosure document to any dealer. Had it done so, it would have had to disclose all "material facts" regarding its franchise system, as defined in the Franchise Acts and their corresponding regulations. In addition to the prescribed material facts set out in the Franchise Acts and their corresponding regulations, Sears would have had to disclose such material facts as:

(a) the percentage of dealers that were not profitable because of the inadequate compensation structure;

(b) the percentage of dealers that exhaust their resources and cease operating within a few years of opening;

(c) whether revenues of Hometown stores have been steadily declining;

(d) Sears competes directly with the dealers by selling into their Market Area through direct channel sales shipped directly to the customer in respect of which Sears pays no commissions to the dealers;

(e) Contrary to the statement on Sears website devoted to "Business Opportunities" for "Dealer Store Owners" that there is "no merchandise shipping or handling fee," Sears charges and keeps for itself a "handling fee" of $3.95 for items purchased through a direct channel for shipment to a Hometown store, even though the dealer handles the item when the customer picks it up from the Hometown store; and

(f) Sears does not share the costs of local advertising undertaken by the dealer contrary to section 19.01 and Part H of Schedule A of the Dealer Agreement.

93. Sears did not provide a disclosure document to any class member.

94. By failing to provide a disclosure document, Sears has breached section 5 of the Wishart Act entitling the dealers to damages under section 7 thereof.

95. Further, each of the omissions pleaded at paragraph 92 above constitutes a misrepresentation within the meaning of sections 1(1) of the Wishart Act entitling the dealers to damages under section 7 thereof.

96. Sears further breached its disclosure obligations by providing prospective dealers with a franchise brochure (the "**Brochure**") that made the following misrepresentations about the Hometown store system:

(a) "[t]his business model is brilliant. You partner with Sears and own one of our prestigious community stores";

(b) "... we have created an opportunity to move up the escalator of business ownership and have concentrated on the elements that are critical to success";

(c) "Sears wants you, our partner, to succeed. In fact, we take a personal and financial interest in your success";

(d) "Better than a Franchise"

(e) "A Smart Business Model;" and

(f) "as a Sears Hometown Store owner, you will have a competitive advantage not normally associated with small businesses."

97. Each of these representations contained in the Brochure was false and misleading. Sears was negligent, reckless or careless in making such representations and in failing to disclose any of the material facts set out in paragraph 92 above to prospective Hometown dealers.

98. Sears knew and intended at all material times that the information contained in the Brochure would be used to induce members of the public to become Hometown dealers.

99. Sears knew and intended at all material times that prospective dealers would rely reasonably to their detriment upon the Brochure in making their decision to become a Hometown dealer.

100. Prospective Hometown dealers were entitled to, and did, reasonably rely on the Brochure and the lack of disclosure of the material facts set out in paragraph 92 in making a decision to become Hometown dealers.

101. The plaintiff pleads and relies on article 1375 of the Civil Code.

Failure to Support and Protect the Brand

102. It is a fundamental obligation of Sears under the Dealer Agreements that Sears would take proper measures and reasonable steps to support and protect the Hometown store network and the Sears brand by:

(a) providing proper support to the Hometown store network and Sears brand;

(b) promoting the ongoing success of the Hometown store network and Sears brand; and

(c) meeting and addressing market challenges facing the Hometown store network and Sears brand.

103. In addition to the particular conduct described above, beginning in 2014 and continuously since then, Sears has breached the obligations set out in paragraph 102 above by:

(a) eliminating support staff positions for the Hometown stores;

(b) nearly doubling the number of Hometown stores that a district manager is responsible for overseeing;

(c) reducing or not conducting any product education sessions for Sears products for Hometown store dealers;

(d) having constant turnover of management and other Sears personnel responsible for the oversight, strategy and direction of the Hometown store network; and

(e) reducing advertising and promotion of the Hometown stores.

104. In addition to its failure to support and protect the Hometown store network, Sears has eroded the "Sears" brand and failed to promote the ongoing success of the "Sears" brand by selling the leases and closing its flagship corporate Sears locations across Canada, including the locations at Toronto's Yorkdale Shopping Centre and Mississauga's Square One Shopping Centre in June, 2013 and Toronto's Eaton Centre in October, 2013. These closures have had an immediate negative effect on the "Sears" brand and in turn, the Hometown store network. Additionally, Sears has engaged in other cost-cutting measures, including eliminating head office personnel and support staff for its Parts and Service department, transferring customer service support overseas, and outsourcing the fulfillment of catalogue orders to third parties and no longer owning or operating the warehouse that was used to fulfill catalogue orders resulting in missed or delayed customer orders, all to the detriment of the Hometown store dealers.

105. Rather than reinvesting the proceeds from the sale of the leases and other cost-cutting measures into supporting or promoting the the Hometown store network or "Sears" brand, Sears used such funds to pay out extraordinary dividends to its shareholders, with the primary beneficiaries being Sears' American parent corporations who owned a majority shareholding in Sears.

106. As a result of the aforementioned conduct, Sears has failed to take reasonable steps to support and protect the Hometown store network and has: (i) breached the Dealer Agreements, including the duty to perform its obligations thereunder in good faith; (ii)

breached the statutory duty of fair dealing under the Wishart Act; and (iii) acted contrary to the duties contained in articles 6, 7 and 1375 of the Civil Code.

Harm to Dealers

107. As a direct result of the aforementioned acts and omissions, Sears has realized significant revenues and profits on the Hometown stores program while the dealers' revenues and profits have declined. Sears has deliberately kept commission rates low even though it was aware that commission rates were insufficient to cover the basic costs of running a Hometown store and that the dealers must use their dwindling revenues to pay for significantly increased costs of operation. By virtue of its acts and omissions pleaded above, Sears has destroyed the right of dealers to enjoy the fruits of the Dealer Agreement and has deprived the dealers of the opportunity to fairly participate in the revenues and profits generated by the Hometown store program.

108. Sears' aforementioned breaches have caused a drastic reduction in the number of Hometown stores from approximately 260 at the end of 2012 to less than half of that by the fourth quarter of 2015.

109. As a direct and foreseeable consequence of the acts and omissions pleaded above, dealers are entitled to substantial damages for:

(a) breach of contract, including breach of the duty of good faith;

(b) breach of the statutory duty of fair dealing under section 3 of the Wishart Act (or, in the event that the Wishart Act does not apply to class members carrying on business outside of Ontario, under the corresponding section of

the Franchise Acts and articles 6, 7 and 1375 of the Civil Code in respect of each class member carrying on business in a province in which a Franchise Act applies or in Quebec as the case may be); and

(c) statutory misrepresentation under section 7 of the Wishart Act (or, in the event that section 7 of the Wishart Act does not apply to class members carrying on business outside of Ontario, under the corresponding section of the Franchise Acts and article 1375 of the Civil Code in respect of each class member carrying on business in a province in which a Franchise Act applies or in Quebec as the case may be).

110. Further and in the alternative, Sears must account for and disgorge all profits unreasonably retained as a result of its acts and omission described above. Sears has retained these profits unjustly, to the detriment of dealers and without juristic reason.

Accounting of Catalogue Sales Commissions

111. Section D of Schedule "A" to the Dealer Agreement provides that the dealer "will be provided with a statement each month which outlines how the Compensation was calculated". In breach of this section, Sears provides the dealers with a lump sum amount on their monthly statements showing commissions paid but no accounting of how the commissions were calculated. Dealers are unable to verify the amounts or the basis for such calculations. Despite requests from the dealers or their representatives, Sears has failed to properly account to the class members for commissions.

112. Sears has breached the Dealer Agreements by failing to account. Accordingly, the dealers request a complete account of all commissions since the inception of their Dealer Agreements and judgment for any shortfall arising therefrom.

July 5, 2013

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1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC. et. al.
Defendants

Court File No. 3769/13 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT MILTON

FRESH AS AMENDED STATEMENT OF CLAIM

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Lawyers for the plaintiff

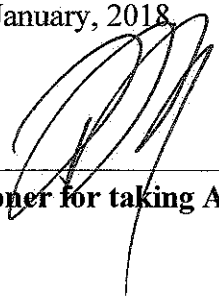
TAB 2

This is Exhibit **"2"** referred to in

the Affidavit of James Kay

sworn before me this 15 th

day of January, 2018.



A Commissioner for taking Affidavits

CITATION: 1291079 Ontario Limited v. Sears Canada Inc., 2014 ONSC 5190
COURT FILE NO.: 3769/13
DATE: 2014-09-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
1291079 ONTARIO LIMITED	)	
	)	David Sterns and Andy Seretis, Counsel for
Plaintiff	)	the Plaintiff
	)	
– and –	)	
	)	
SEARS CANADA INC. and SEARS, ROEBUCK AND CO.	)	Peter F.C. Howard and Samaneh Hosseini, Counsel for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** June 11, 2014

REASONS FOR JUDGMENT

GRAY J.

[1] The plaintiff was a "Sears Hometown Store" operator. Sears is a well-known, large retailer.

[2] This case has to do with the relationship between operators of Hometown Stores and Sears. In substance, it is alleged that Sears has taken inappropriate and undue advantage of its position, to the unlawful disadvantage of the store operators.

[3] In this motion to certify an action as a class proceeding, the plaintiff seeks to represent a class of persons who had, or have, Hometown Store contracts with Sears. It is said that the contractual arrangements constitute the members of the class as "franchisees" and the defendants as "franchisors", thus making applicable the provisions of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3. If so, the provisions of that *Act* bring into play certain disclosure obligations that have not been fulfilled, and a number of substantive provisions that

give rise to statutory causes of action and potential damages. In the alternative, it is alleged that the defendants have breached their common-law obligation of exercising discretion under the agreements in good faith, thus giving rise to damages.

[4] For the reasons that follow, the motion is granted and this action is certified as a class proceeding.

Background

[5] As I will discuss more fully later, the plaintiff is required to satisfy the requisites of section 5(1) of the *Class Proceedings Act*, S.O. 1992 c.6, as amended. With respect to the issue of whether a cause of action is disclosed, only the pleadings are to be examined. Regarding the other criteria, it is incumbent on the plaintiff to show that there is some basis in fact to support the conclusion that each criterion has been met.

[6] With these requirements in mind, I will discuss the basis of the claim and the defences as outlined in the pleadings, and some of the evidence that is relevant to the other criteria.

[7] The plaintiff alleges that the members of the class comprise a network of approximately 260 "Sears Hometown Stores" pursuant to a standard Dealer Agreement. The plaintiff alleges that the Dealer Agreement is a franchise agreement within the meaning of the *Arthur Wishart Act*.

[8] The plaintiff alleges that Sears uses its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieves unattainable revenues. The plaintiff alleges that Sears is aware that the Hometown Store program is not economically viable for the dealers.

[9] The plaintiff alleges that the Hometown Store program is profitable for Sears. It is alleged that Sears realizes high profit margins on sales made through the Hometown Stores while downloading high costs onto the dealers. While Sears maintains unilateral, discretionary power under the agreement to adjust the dealers' financial compensation, Sears has ignored repeated pleas to exercise its discretion to increase compensation to a sustainable level.

[10] The plaintiff alleges that Sears conceals the economic reality about the Hometown Store program from prospective dealers. It disregards franchise disclosure laws designed, among other things, to provide full disclosure of all material facts related to the franchise system. Instead of disclosing the truth about the economics of the system, it provides a common information package to prospective dealers which touts the system as "brilliant", "better than a franchise", and "a smart business model".

[11] The plaintiff alleges that once the Dealer Agreement is signed, Sears exploits the dealer by maintaining a compensation structure that does not allow the dealer to make a living wage, let alone a return on its investment and efforts; Sears poaches sales in the dealers' Market Areas by selling goods directly to customers; Sears charges an unauthorized "handling fee" on goods purchased online or by telephone and shipped to the dealers' stores; and Sears has introduced new programs that actually claw back for many dealers what little economic benefits the program delivers to the dealers.

[12] The plaintiff alleges that these actions of Sears are contrary to its contractual duty of good faith and statutory duty of fair dealing.

[13] The plaintiff alleges that on goods sold through a Hometown Store, Sears realizes a gross margin of approximately 36 per cent. It is alleged that out of that amount, Sears pays the dealer approximately 10 per cent. Out of that commission, the dealer must pay rent, its employees, utilities and all other expenses. It is alleged that the vast majority of dealers barely earn enough commissions to cover their expenses and pay minimum wage to the principals.

[14] The plaintiff alleges that under the Dealer Agreement, the commissions can be changed by Sears in its sole discretion on 90 days notice. The plaintiff alleges that Sears has a duty of good faith and a statutory duty of fair dealing under the *Arthur Wishart Act* to exercise its discretion in a manner which is fair and commercially reasonable. Instead, it is alleged that Sears has perpetuated a predatory system of under-compensation. The plaintiff alleges that the commissions need to be increased to at least 15 per cent in order for the network to be viable. Instead, Sears has lowered commission rates and unlawfully competed within the dealers' Market Areas by shipping directly to customers, and offered lowered prices through direct selling channels while prohibiting dealers from matching prices.

[15] Specifically, the plaintiff alleges that in August 2012, Sears reduced the average retail commission rates paid to dealers.

[16] The plaintiff alleges that the Dealer Agreement does not permit Sears to compete in the dealers' Market Areas using direct shipping through direct channels. Despite this, it is alleged that Sears actively competes by selling through direct channels and shipping directly to customers in the dealers' Market Areas. In the event that the Dealer Agreement does not specifically prohibit Sears from acting in this way, it is alleged that Sears has failed to take the dealers' reasonable commercial interests into account or comply with the duties of good faith and fair dealing.

[17] The plaintiff alleges that Sears charges a $3.95 flat handling fee for customers that purchase items through a direct channel and choose to ship to a Hometown Store for pick up. This fee is kept by Sears and not by the dealer. The plaintiff alleges that the imposition of the fee is a breach of the Dealer Agreement or alternatively it constitutes a breach of the duties of good faith and fair dealing.

[18] The plaintiff alleges that Sears has changed the method of sharing advertising costs with the dealer, the result of which is that dealers are now paying more for local advertising. It is alleged that these changes are a breach of the Dealer Agreement, or alternatively they constitute a breach of the duties of good faith and/or fair dealing.

[19] The plaintiff alleges that Sears is a franchisor under the *Arthur Wishart Act*, and each dealer is a franchisee. Thus, it is alleged that Sears owes the class members a duty of fair dealing in the performance and enforcement of the Dealer Agreement under section 3 of *Act*. It is alleged that the actions of Sears constitute violations of these duties.

[20] The plaintiff alleges that pursuant to the *Arthur Wishart Act*, Sears was required to deliver to prospective dealers a statutorily prescribed disclosure document. It is alleged that Sears did not do so. Had it done so, Sears would have to had to disclose materials facts, including:

a) over 70 per cent of dealers are not profitable;

b) many dealers exhaust their resources and cease operating within a few years;

c) revenues of Hometown Stores have been steadily declining;

d) Sears competes directly by selling into dealers' Market Areas through direct channels;

e) Sears charges an improper handling fee of $3.95 for items purchased through a direct channel for shipment to a Hometown Store;

f) Sears does not share the cost of local advertising undertaken by the dealer.

[21] The plaintiff claims that each dealer is entitled to damages pursuant to sections 3 and 7 of *Arthur Wishart Act*.

[22] In the event that the *Arthur Wishart Act* does not apply, the plaintiff claims that the members of the class are entitled to damages for breach of contract, including breach of the duty of good faith; and disgorgement of profits unreasonably retained as a result of Sears' unjust enrichment. It is pleaded that Sears has retained those profits unjustly, to the detriment of dealers and without juristic reason.

[23] The plaintiff claims that Sears has violated the Dealer Agreements by failing to account for commissions, and now claims a complete accounting of all commissions since the inception of the Dealer Agreements, and judgment for any shortfall arising therefrom.

[24] In the statement of defence, it is asserted that Sears Canada Inc. is a leading retailer of general merchandise in Canada. It is asserted that Sears, Roebuck and Co. does not carry on business in Canada. It is asserted that Sears, Roebuck is only a party to the Dealer Agreements because it is the owner of several Sears trademarks. Otherwise, Sears, Roebuck has no other duties or obligations under the Dealer Agreements.

[25] The defendants assert that the *Arthur Wishart Act* does not apply to the Sears Hometown Stores. It is asserted that the operators of the Hometown Stores are not franchisees within the meaning of the *Act*.

[26] The defendants deny that dealer commissions have been reduced. In fact, it is asserted that the August, 2012 changes to the compensation structure resulted in an increase to the average commission. It is asserted that direct sales have been part of Sears' business for many years, and there is nothing in the Dealer Agreement that precludes Sears from engaging in this practice. It is asserted that Sears provides a 4.5 per cent commission to dealers on catalogue and internet sales shipped to their stores. It is asserted that the changes to advertising subsidies led to the reduction of advertising expense for the dealers.

[27] The defendants deny that any amendments to the dealer compensation structure and advertising subsidies were detrimental to the dealers, or amounted to a breach of contract, breach of a duty of good faith (or breach of the statutory duty of fair dealing in the event that the *Arthur Wishart Act* applies, which is denied) or unjust enrichment.

Section 5(1) of the *Class Proceedings Act*

[28] As noted earlier, the plaintiff must satisfy the requisites of section 5(1) of the *Class Proceedings Act*. That subsection provides as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interest of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[29] I will discuss each requirement of section 5(1) in turn.

i. Do the pleadings disclose a cause of action?

[30] Under this requirement, all that is to be examined are the pleadings. No evidence is to be considered. With respect to the other requirements of section 5(1), the plaintiff must show that there is some basis in fact for each of those requirements.

[31] It is not in dispute that the test under section 5(1)(a) of the *Class Proceedings Act* is the same as the test under Rule 21.01(1)(b), as to whether a pleading discloses a reasonable cause of action: that is, whether it is "plain and obvious" that the pleading does not disclose a reasonable cause of action: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.). In assessing the claims made in the pleading, it is to be read generously, with allowances for deficiencies: see *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145 (Ont. S.C.J.), at para. 26.

[32] The assertion that the *Arthur Wishart Act* applies to the relationship between Sears and the plaintiff is clearly a proper cause of action. The defendants do not contend otherwise, and indeed they concede that this allegation is properly a common issue. If the *Act* applies, the claims for damages under sections 3 and 7 of the *Act* are clearly appropriate as well.

[33] The defendants also do not deny that the plaintiff has pleaded valid causes of action based on the implied duty of good faith, and unjust enrichment.

[34] I should note that the plaintiff has asserted a cause of action based on negligent misrepresentation, but counsel advised me at the hearing of the motion that that cause of action will be abandoned and the statement of claim amended accordingly. I also note that it is agreed that if the *Arthur Wishart Act* applies, it will be applicable to all operators of stores, both within and outside Ontario.

[35] In the final analysis, the plaintiff has pleaded valid causes of action and accordingly section 5(1)(a) has been satisfied.

[36] I note that while Sears alleges that there is no cause of action against Sears, Roebuck, that is best determined on a motion for summary judgment if one is brought.

(ii) Is there an identifiable class of two or more persons?

[37] The class proposed by the plaintiff consists of all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.

[38] The requirements of a class capable of certification were summarized by Strathy J. (as he then was), in *Fairview Donut Inc. v. The TDL Group Corp*, [2012] O.J. No. 834 (S.C.J.), at para. 220, as follows:

> (a) membership in the class should be determinable by objective criteria without reference to the merits of the action;
>
> (b) the class criteria should bear a rational relationship to the common issues asserted by all class members, but all class members need not share the same interest in the resolution of the asserted common issues;
>
> (c) the class must be bounded and not of unlimited membership;
>
> (d) there is a further obligation, although not onerous, to show that the class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues;
>
> (e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation; and
>
> (f) a proper class definition does not need to include only those persons whose claims will be successful.

[39] The defendants attack the proposed class definition, primarily on the basis that it does not distinguish between dealers who signed Dealer Agreements before and after August, 2012 when changes were made to the commission structure and advertising subsidies. Specifically,

the defendants assert that claims based on the August, 2012 changes are not tenable for the following groups of dealers:

(a) dealers who terminated Dealer Agreements prior to August, 2012;
(b) dealers who had Dealer Agreements as of 2012, and have allowed their agreements to be renewed since then; and
(c) dealers who entered into Dealer Agreements after August, 2012.

[40] The defendants also argue that the class definition should exclude dealers who entered into Dealer Agreements with knowledge of this action.

[41] I disagree with the defendants, and in my view the class definition as proposed is satisfactory.

[42] I do not read the claim based on the August 2012 amendments in the same way as the defendants appear to read it. Putting aside issues under the *Arthur Wishart Act*, assuming it applies, I read the allegations respecting the August 2012 amendments as examples of Sears' breaches of the obligation of good faith. As I read it, the statement of claim alleges that prior to the August 2012 amendments, Sears was already in breach of its obligation to exercise its discretion under the Dealer Agreements in good faith, and the August 2012 amendments simply resulted in further detriment to the dealers. Fundamentally, the plaintiff alleges that any dealer who was subject to a Dealer Agreement suffered in the same way, although the amount of harm at any particular point in time might have been different.

[43] I think the class as proposed is satisfactory and meets the criteria set out by Strathy J. in *Fairview Donut,* even though all class members do not share exactly the same interest in the resolution of one or more of the common issues.

(iii) Are there appropriate common issues?

[44] The term "common issues" is defined in section 1 of the *Class Proceedings Act* as

a) common but not necessarily identical issues of fact, or

b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[45] The principles concerning the definition of appropriate common issues were summarized by Strathy J. in *Fairview Donut, supra*, at paras. 229 and 230, as follows:

a. the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;

b. an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution;

c. there must be a basis in the evidence before the court to establish the existence of common issues;

d. there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;

e. the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;

f. a common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;

g. the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation in the same manner, to each member of the class;

h. a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

i. where questions relating to causation or damages are proposed as a common issue, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;

j. common issues should not be framed in overly broad terms;

k. the core of a class proceeding is the element of commonality – there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this; and

l. the common issues should be clear, neutrally-worded and fair to both parties.

[46] At the argument of the motion, I was furnished with revised proposed common issues by counsel for the plaintiff. They are as follows:

a. Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the obligation to exercise contractual discretion in good faith by:

i. Failing to increase commissions paid to class members;

ii. Reducing commissions paid to class members in August 2012;

iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commissions to the class members for good sold directly to customers located within the class members' Market Areas through direct channels (as described below);

iv. Removing or reducing local store advertising subsidies required under Schedule A, paragraph H of the Dealer Agreement;

v. Failing to provide a monthly accounting of how compensation was calculated as required under Schedule A, paragraph D of the Dealer Agreement; or

vi. Imposing handling fees payable by customers on catalogues sales made by dealers?

b. Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

c. If Sears Canada or Sears Roebuck has breached its contractual duties, or been unjustly enriched, what is the appropriate measure of past damages or compensation?

d. Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" or "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("*Wishart Act*") and similar provisions under franchise legislations otherwise governing any such class member? If so:

    i. Are all class members entitled to the benefit of the *Wishart Act* by virtue of the choice of law provisions in the Sears standard Dealer Agreement?

    ii. Did Sears breach the duty of fair dealing under s. 3 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member by any of the acts or omission set out in (a) (i) to (vi) above and, if so, what are the damages?

    iii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member), at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof?

e. Did Sears fail to disclose the material facts particularized in paragraph 93 of the statement of claim to each dealer before the dealer signed the Dealer Agreement?

    i. If so, directions pursuant to s. 25(2) of the CPA for the calculation of individual damages for misrepresentation or under s.7(1) of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member); and

f. What scale and quantum of costs should be awarded?

[47] The plaintiff must show, through evidence, that there are appropriate common issues. The test is not a high one. The plaintiff must show that there is "some basis in fact" for the proposition that there are appropriate common issues: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, at para. 99.

[48] It is clear from *Cloud, supra*, that the resolution of the common issue or issues need not resolve the entire action. It is sufficient if it resolves an issue or issues that will move the action some distance. The fact that there may be many individual issues left to be determined does not mean that common issues should not be certified. As Goudge J.A. stated in *Cloud* at para. 53:

> In other words, an issue can constitute a substantial ingredient of the claims and satisfy s.5(1)(c) even if it makes up a very limited aspect of the liability questions and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s.5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than elucidate the various individual issues which may remain after the common trial.

In my view, the question of whether the individual issues will unduly dominate the action is more properly part of the preferability inquiry: *Cloud*, at paras. 73-76; and *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[49] Both parties have filed extensive evidence, primarily on the commonality issue.

[50] While Sears asserts that there are some differences in the contractual arrangements, in that there were a variety of supplementary agreements with individual dealers, Sears does not argue that those differences are sufficient to disqualify reliance on the Dealer Agreement by the plaintiff as a basic common feature. Sears' argument, in the main, rests on the assertion that the plaintiff's allegations are founded on the effect of Sears' conduct on the members of the class, which will differ from dealer to dealer.

[51] Sears points out that, in its simplest terms, the plaintiff's allegation is that dealers do not make enough money. Sears asserts that each of the allegations under proposed common issue (a) involves business practices by Sears that are alleged to be breaches of the duty of good faith or unjust enrichment because they contribute to or exacerbate the inadequate state of dealer compensation.

[52] Sears submits that "adequacy" of dealer compensation is vague and subjective. In each case, what will be required is a determination of the negative impact of the alleged conduct by Sears, which is clearly an individual issue for each dealer. Determining whether there is negative impact would involve examining each dealer's revenues, expenses, and regional and local factors affecting each dealer, to determine whether the dealer is not making the requisite amount of profit, whatever that might be, and if so, whether that is due to Sears' business practices, to the dealer's own inadequate business practices, or to factors external to both parties.

[53] Alternatively, if the plaintiff is attempting to say that Sears' alleged conduct had a negative impact on the whole class, the plaintiff must adduce evidence that such harm can be determined on a class-wide basis and has failed to do so.

[54] The defendants primarily rely on *Fairview Donut, supra*; *Spina v. Shoppers Drug Mart Inc.*, [2013] O.J. No. 4979 (S.C.J.); and *909787 Ontario Ltd. v. Bulk Barns Food Ltd.* (2000), 138 O.A.C. 180 (Div. Ct.).

[55] In my view, Sears' reliance on *Fairview Donut* is misplaced. While it is true that Strathy J. held that some of the common issues were not certifiable, he did say that an issue as to whether franchisees were required to sell baked goods at "commercially unreasonable" prices could be certified if structured properly. He relied on the decision of the Divisional Court in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, (2009), 96 O.R. (3d) 252 (Div. Ct.), a decision that was affirmed by the Court of Appeal, 100 O.R. (3d) 721 (C.A.). At paras. 256 and 257 of *Fairview Donut*, Strathy J. stated:

> 256. On the other hand, in *Quizno's*, the Divisional Court was not concerned about the fact that the amount of loss or damage sustained by class members might vary from region to region or from time to time because of the "systemic" nature of the conduct potentially giving rise to liability. The system included a common contract, a common pricing system and a common distribution system. It included the addition of mark-ups and sourcing fees by the franchisor on every single product, with an additional mark-up being added by the distributor. In *Quizno's*, the complaint was not just in relation to some products acquired by franchisees; it related to all the products they sold. Moreover, the plaintiff alleged that some forty percent of *Quizno's* franchisees were operating at a loss.
>
> 257 The majority of the Divisional Court held in *Quizno's* that the breach of contract claim gave rise to common issues. The issue of the commercial

> reasonableness of the defendants' mark-ups and sourcing fees could be addressed in common by examining the franchisor's conduct, the services it provided and industry standards.

[56] I think Strathy J.'s reasoning as to the common features arising from the conduct of the defendant in that case is applicable here. As noted, the Divisional Court's decision in *Quizno's* was affirmed by the Court of Appeal.

[57] In *Spina*, Perell J. certified a number of issues as common issues but declined to hold that Shopper's Drug Mart's budgeting process gave rise to a common issue. The process itself involved setting a specific budget for each store. There was simply insufficient commonality, even on the part of the defendant's conduct, to say that there was a certifiable common issue.

[58] The Divisional Court's decision in *Bulk Barn* was considered by Strathy J. in *Fairview Donut*, at paras. 254 and 255, but he found more persuasive the Divisional Court's decision in *Quizno's*.

[59] Closer to the facts of this case is *Ontario v. Mayotte* (2010), 99 C.P.C. (6th) 229 (Ont. S.C.J.). In that case, it was alleged that the Province of Ontario had under-compensated private issuers of driver's licences.

[60] Perell J. held that the following issues were proper common issues:

a. Does the contractual relationship between Ontario and the private issuers include a duty on Ontario to ensure that Issuer compensation is, and remains fair, rational, objectively determined, and proportional to the effort required to do each transaction?

b. Does Ontario have one or more of the following contractual obligations to the private issuers in respect of compensation:

    i. to adequately increase the standard commission rate table,

    ii. to update the time series analysis on which compensation was and continues to be based,

iii. to take into consideration all steps required to perform the required transactions, and

iv. to sufficiently increase the annual stipend?

c. If so, has Ontario breached and is it continuing to breach any such contractual obligation?

d. Was Ontario under a duty to increase compensation to the private issuers following the conclusions of the report of the Ministry of Transportation dated August 28, 2003?

e. Has Ontario satisfied its duties by the increases in compensation which it has put into effect since August 28, 2003?

f. If Ontario has not breached its contractual duties to the private issuers in respect of compensation, has Ontario been unjustly enriched by having under-compensated the private issuers?

[61] The defendant in *Mayotte* argued that to determine all or some of these questions it would be required that individual findings of fact be made about the circumstances of each contractual relationship. Perell J. disagreed. At para. 75, he stated "A trial judge might conclude that in the circumstances Ontario breached its contracts with all of the private issuers as of August 28, 2003 when it is alleged that Ontario knew that the compensation rate paid to the private issuers was not fair, proportional, rational, or objective."

[62] In the action before me, it is alleged that there is a common Dealer Agreement; dealers' compensation is fixed by a common formula; advertising subsidies are commonly fixed, with a few exceptions; and Sears sells directly into each dealer's Market Area. It is alleged that Sears knows that these features result in unreasonable rates of renummeration to dealers, which violates Sears' obligation to exercise its discretion under the dealers' agreements in good faith. In the alternative, it is alleged that Sears is unjustly enriched. If the *Arthur Wishart Act* applies, there are common questions as to whether it has been complied with. The resolution of the common issues will move the action a long way: *Cloud* at para. 82.

[63] As did Perell J. in *Mayotte*, I think the questions set out in proposed common issues (a) and (b) are suitable common issues. However, there are amendments I will make in order to make them more neutral and fair to both sides.

[64] As was the case in *Cloud*, there will be individual issues that must be determined. Assuming the plaintiff succeeds on the common issues, or some of them, the measure of damages for each member of the class will depend not only on the effect of Sears' conduct, but on the individual circumstances of each dealer. However, the common issues trial judge will have ample tools at his or her disposal to determine appropriate damages on a class-wide basis, or an individual basis, or both: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.). As was the case in *Markson*, damages can be certified as a common issue, but might also be determined individually. The common effect of Sears' conduct may give rise to damages that can be attributed to the class as a whole. There will likely also be damages that must be determined individually. That is something to be determined by the common issues trial judge after deciding the common issues.

[65] Costs are not a common issue.

[66] I have revised the proposed common issues, and they are attached to these reasons as Appendix A.

[67] I am prepared to consider further revisions, which will be discussed at the next case conference.

iv. Is a class proceeding the preferable procedure for resolving the common issues?

[68] The preferability inquiry involves answering two questions: first, would the class action be a fair, efficient and manageable method of advancing the claim? Second, would the class action be preferable to other reasonably available means of resolving the claims of class members? See *Cloud, supra*; and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.).

[69] As noted earlier in my discussion of *Cloud*, the preferability inquiry largely involves a determination of whether individual issues will overwhelm the common issues.

[70] For the reasons discussed earlier, I do not think the individual issues will overwhelm the common issues. Undoubtedly, there will be a number of individual matters that need to be addressed after the resolution of the common issues, assuming the plaintiff is successful. As noted, damages will need to be assessed, and to some extent at least this will involve individual determinations.

[71] However, as pointed out in *Markson*, the common issues trial judge has many tools at his or her disposal to deal with such issues once the common issues have been addressed.

[72] I am not persuaded that the individual issues will overwhelm the common issues. As noted earlier, I think the resolution of the common issues will move the action a long way.

[73] Assuming the common issues are proper and that the individual issues will not overwhelm them, the defendants do not suggest that there is any other reasonably available means of resolving the claims of class members. There is no alternative procedure required by legislation. The only issue is whether a common issues trial is the preferable method, or whether individual trials commenced by individual members of the class are preferable. In my view, a common issues trial is the preferable method.

v. Is the plaintiff an appropriate representative plaintiff?

[74] The plaintiff no longer operates a Hometown Store. Thus, it has no ongoing stake in the result of the litigation. At most, it will have a right to past damages.

[75] The defendants point out that the plaintiff is now essentially a shell company, with no ability to satisfy a costs order.

[76] James Kay, the principal of the plaintiff, swears that the plaintiff operated a Hometown Store from June, 2007 until it gave notice of termination of the Dealer Agreement in August, 2013, and the Agreement terminated effective December 14, 2013. He swears he has a real and genuine interest in resolving the issues in the lawsuit for himself and for the benefit of all dealers. He swears that the termination of the Dealer Agreement in no way affects his willingness and ability to be the class representative.

[77] Mr. Kay swears that he is aware of the duties owed by the class representative to the class and he is committed to contributing his time, knowledge, energy and leadership to bringing the case to a successful conclusion.

[78] Mr. Kay swears that neither he nor the corporate plaintiff have any interest in conflict with any of the members of the proposed class.

[79] Mr. Kay has proposed a plan for proceeding with the action. He sets out a plan of proceeding which sets out a method of advancing the case on a timely basis, including notice to be sent to the class members; the furnishing of affidavits of documents and productions; examinations for discovery and motions arising therefrom; the exchange of expert reports; mediation; a pre-trial conference; and a common issues trial. Individual hearings, if any, would be conducted after the common issues trial.

[80] Counsel for the defendants submits that the plaintiff is not a proper representative plaintiff. Counsel submits that the plaintiff has a conflict with other members of the class, in that it is no longer the operator of a Hometown Store. Counsel also submits that the plaintiff has no ability to satisfy a costs award. Counsel relies on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 S.C.C. 46, at para. 41, where McLachlin C.J.C. stated:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). [Emphasis added]

[81] In my view, that statement by McLachlin C.J.C. must be considered in light of the decision of the Court of Appeal in *Pearson, supra,* and the decision of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.).

[82] At para. 95, of *Pearson*, Rosenberg J.A. stated:

> [95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338. In referring to the reasons of the motions judge in this case and the statement from Western Canadian Shopping Centres about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following, at paras. 91 and 94:

> The statements in [Western Canadian Shopping Centres] and *Pearson* are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have the result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place – a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of s.5(1)(e) of the CPA.
>
> *****
>
> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class – or the specific terms of s.5(1)(e) – should be considered to require them to demonstrate this.

[83] It is always open to the defendants to move under rule 56.01(1)(d) for security for costs, subject to any special considerations that may apply to class proceedings: see *Peter v. Medtronic Inc.* (2008), 66 C.P.C. (6th) 274 (Ont. S.C.J.); and *Dean v. Mister Transmission (International) Ltd.* (2009), 79 C.P.C. (6th) 181 (Ont. S.C.J.). In the meantime, I do not think the plaintiff should be disqualified as an appropriate representative plaintiff in a class proceeding simply on the basis that it does not have the ability to pay costs.

[84] I do not think the plaintiff has any conflict of interest with the other class members. Its interests may not go as far as those of some other class members, but there is no conflict.

[85] As far as the litigation plan is concerned, the defendants have not made any particular criticism of it, other than to submit that it is generic. It is clear that a motion to certify a class proceeding should not be defeated simply on the basis of deficiencies in a litigation plan. I am prepared to entertain any suggestions for amendments to the plan at the next case conference.

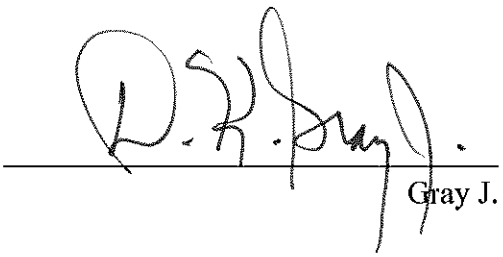
[86] I am satisfied that the plaintiff is an appropriate representative plaintiff.

Disposition.

[87] For the foregoing reasons, this action is certified as a class proceeding.

[88] I assume that the parties can agree on the form and content of the formal order. If so, they should bring it to the next case conference and I will sign it. If they cannot agree, I will deal with any issues at the case conference.

[89] I will entertain written submissions with respect to costs, not to exceed five pages together with a costs outline. Counsel for the plaintiff shall have five days to file submissions, and counsel for the defendants shall have an additional five days to respond. Counsel for the plaintiff shall have three days to reply.



Gray J.

Released: September 8, 2014

APPENDIX A

COMMON ISSUES

(a) Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:

i. Failing to increase commission paid to class members;
ii. Changing commissions paid to class members in August 2012;
iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;
iv. Changing local store advertising subsidies;
v. Failing to provide a monthly accounting of how compensation was calculated; or
vi. Imposing handling fees payable by customers on catalogues sales made by dealers?

(b) Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

(c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?

(d) Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" of "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*Arthur Wishart Act)*? If so:

i. Did Sears breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?
ii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

CITATION: 1291079 Ontario Limited v. Sears Canada Inc., 2014 ONSC 5190
COURT FILE NO.: 3769/13
DATE: 2014-09-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

– and –

SEARS CANADA INC. and SEARS, ROEBUCK AND CO.

Defendants

REASONS FOR JUDGMENT

Gray J.

Released: September 8, 2014

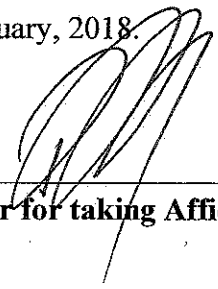
TAB 3

This is Exhibit **"3"** referred to in

the Affidavit of James Kay

sworn before me this 15 th

day of January, 2018.



A Commissioner for taking Affidavits

Court File No. 3769/13 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	MONDAY, THE 8th
	)	
JUSTICE D.K. GRAY	)	DAY OF SEPTEMBER, 2014

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC. and SEARS, ROEBUCK AND CO.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the plaintiff for an order certifying this action as a class proceeding, appointing 1291079 Ontario Limited as representative plaintiff and providing for notice to the class was heard on June 11, 2014, at Milton, and the decision reserved to this day.

ON READING the material filed including the notice of motion, the affidavit of James Kay sworn November 14, 2013, the affidavit of Greg Wallace sworn March 3, 2014, the transcript of the cross-examination of James Kay conducted on May 6, 2014, the transcript of the cross-examination of Greg Wallace conducted on May 7, 2014, the parties' respective facta, the statement of claim, filed, the statement of defence, filed, and on being advised by the plaintiff

that it was not proceeding with the cause of action in negligent misrepresentation and on hearing the submissions of counsel for the plaintiff and the defendants,

AND UPON being advised that the parties had reached an agreement in respect of the quantum of costs to be paid to the plaintiff by the defendants,

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding as against Sears Canada.

2. **THIS COURT ORDERS** that the class be and is hereby defined as all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.

3. **THIS COURT ORDERS** that the plaintiff be and is hereby appointed as the representative plaintiff on behalf of the Class.

4. **THIS COURT ORDERS** that the following common issues be and are hereby certified for the purposes of this proceeding:

   (a) Has Sears Canada, at any time since July 5, 2011 breached its obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:

      (i) Failing to increase commission paid to class members;

      (ii) Changing commissions paid to class members in August 2012;

(iii) Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;

(iv) Changing local store advertising subsidies;

(v) Failing to provide a monthly accounting of how compensation was calculated; or

(vi) Imposing handling fees payable by customers on catalogues sales made by dealers?

(b) Has Sears Canada been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

(c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?

(d) Is Sears Canada a "franchisor" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*Arthur Wishart Act)*? If so:

(i) Did Sears Canada breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?

(ii) Was Sears Canada required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s. 5(3) of the *Act* otherwise complied with? If s. 5 was not complied with, what are the damages for the class under s. 7?

5. **THIS COURT ORDERS** that Sears Canada shall deliver to counsel for the plaintiff a list of names and last known addresses, email addresses and telephone numbers of the Class Members in electronic spreadsheet format within 30 days of the date of this order.

6. **THIS COURT ORDERS** that a notice of certification to the Class in a form attached as Schedule "A" (English) and Schedule "B" (French) to this order (the "Notice to the Class") is hereby approved.

7. **THIS COURT ORDERS** that the English Notice to the Class shall be mailed to all Class Members by counsel for the plaintiff and published on the website of Sotos LLP on or before March 20, 2015.

8. **THIS COURT ORDERS** that the French version of the Notice to the Class shall be posted on the website of Sotos LLP and mailed to all Class Members in the Provinces of Quebec and New Brunswick on or before March 20, 2015.

9. **THIS COURT ORDERS** that the cost of mailing the Notice to the Class shall be paid by the plaintiff.

10. **THIS COURT ORDERS** that a Class Member may opt out of the class proceeding by sending to Sotos LLP either the Opt-Out Coupon attached to the Notice to the Class, or some other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, on or before the expiry of the 90th day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.

11. **THIS COURT ORDERS** that Sotos LLP shall advise defendants' counsel of any Notices to the Class returned as undeliverable forthwith upon the return of the Notices to the Class, after which counsel for the defendants shall make best efforts to provide class

counsel with updated information for the affected dealers so that the Notice to the Class can be re-sent to such class members.

12. **THIS COURT ORDERS** that a Class Member may not opt out of the class proceeding after the expiry of the 90th day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.

13. **THIS COURT ORDERS** that Sotos LLP shall serve on Sears Canada, within 7 days after the end of the opt-out period described in paragraph 10 hereof, an affidavit containing a list of persons who have opted out of the class proceeding and attaching copies of all Opt-Out Coupons, or other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, received from Class Members.

14. **THIS COURT ORDERS** that Sears Canada shall pay to the plaintiff costs of this motion in the amount of $70,000.00, which amount is inclusive of fees, disbursements and HST, on or before October 9, 2014.

D.K. Gray J.

GRAY, J.

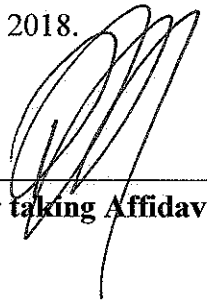
TAB 4

This is Exhibit **"4"** referred to in

the Affidavit of James Kay

sworn before me this 15th

day of January, 2018.



A Commissioner for taking Affidavits

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

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

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

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

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This

will entitle you to ten more days within which to serve and file your Statement of Defence.

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

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

October 21, 2015 Issued by _____
Local Registrar

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

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

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

AND TO: **ESL INVESTMENTS INC.**
200 Greenwich Avenue
Greenwich, CT 06830
United States of America

AND TO: **WILLIAM C. CROWLEY**
146 Central Park West, Apartment 10E
New York NY 10023
United States of America

AND TO: **WILLIAM R. HARKER**
39 Remsen Street- Apt. LB
Brooklyn NY 11201
United States of America

AND TO: **DONALD CAMPBELL ROSS**
73 Donwoods Drive
Toronto ON M4N 2G6

AND TO: **EPHRAIM J. BIRD**
1017 N. Ridge Road
Salado TX 76571
United States of America

AND TO: **DEBORAH E. ROSATI**
11821 Lakeshore Road RR#2
Wainfleet ON LOS 1VO

AND TO: **R. RAJA KHANNA**
31 Delaware Avenue
Toronto ON M6H 2S8

AND TO: **JAMES MCBURNEY**
4 Luxemburg Gardens
London W6 7EA
United Kingdom

AND TO: **DOUGLAS CAMPBELL**
13 Roxborough Street West
Toronto ON MSR 1T9

CLAIM

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

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

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

   (c) compensation pursuant to s. 241(3)(j) of the CBCA in an amount not exceeding $100,000,000;

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

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

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

Parties

2. The plaintiff, 1291079 Ontario Limited ("**129**"), is incorporated under the laws of Ontario. Until December, 2013, 129 carried on business in the Town of Woodstock, Ontario, as a retailer under the "Sears Hometown" store program. 129 is the class representative in a certified class proceeding against Sears Canada Inc., bearing Court File No. CV- 3769 /13-CP (the "**Class Action**") commenced in Milton, Ontario

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

4. The defendant, Sears Holding Corporation ("**Holding**"), is incorporated under the laws of the State of Delaware in the U.S.A. Until October, 2014, Holding owned 51% of the common shares of Sears, at which time its shareholdings were reduced to approximately 12% following a sale of its shares.

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

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

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

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

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

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

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

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

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

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

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

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

Background

17. 129 is a Sears Hometown store dealer. On July 5, 2013, it commenced a class proceeding against Sears on behalf of all Hometown Dealer stores operating under a Dealer Agreement with Sears at any time on or after July 5, 2011 (the "**Class**"). The Class Action seeks $100 million in damages on behalf of the Class for, *inter alia*, breach of contract and breaches of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("**Wishart Act**").

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

19. 129 proposes that the class in this action be defined in the same manner as the class in the Class Action, namely:

> all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification

The Beginning of the End for Sears

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

21. Beginning in 2011, Sears began incurring large and growing operating losses. In the most recent fiscal year, Sears reported an operating loss of over $400 million. The table below shows Sears' growing operating losses since 2011 (in CAD millions):

Year	Operating Profit (Loss)
2011	($50.9)
2012	($82.9)
2013	($187.8)
2014	($407.3)

22. By 2013, media and analyst reports began reporting that the end was near for Sears given the increasing losses and the absence of a viable plan for turnaround.

23. Even though Sears was losing substantial amounts of money through its operations, it held valuable capital assets, particularly long-term leases in prime shopping centres that were below fair market value rental rates.

24. Beginning in 2013, Sears, at the direction and under the control of Holding and ESL, took steps and made corporate decisions to liquidate these valuable assets in order to benefit Holding and ESL at the expense of creditors. These steps included liquidating Sears' prime assets. Rather than reinvesting these funds to offset the large and growing operating losses and attempt to turn the company around, the primary purpose of these steps was to siphon money out of Canada by paying substantial dividends to Holding and ESL prior to the inevitable bankruptcy filing for Sears.

The Path Towards Insolvency: A Chronology of Asset Stripping

25. In June, 2013, Sears announced that it was selling leases for two of its most prominent locations for $191 million. The locations were in Toronto's highly-coveted Yorkdale Shopping Centre and Mississauga's Square One Shopping Centre.

26. In August, 2013, Sears announced that it was cutting 245 employees and outsourcing its information technology and financing work. This announcement followed Sears' cutting of over 700 employees earlier in 2013.

27. In September, 2013, Sears' CEO, Calvin MacDonald resigned from the company. Mr. MacDonald had become CEO in 2011 and was in the midst of a proposed three-year turnaround plan at the time of his resignation. Mr. MacDonald resigned because of disagreements with Lampert over commitment to Mr. MacDonald's turnaround plan. That same day, Sears announced that Douglas Campbell was appointed its CEO and President.

28. In October, 2013, Sears announced that it was selling five more of its prime leases, including its flagship location in Toronto's Eaton Centre, for $400 million. At the same time, it announced the termination of 965 employees who worked at those locations.

29. In November, 2013, Sears announced that it was selling its 50% joint venture interest in eight properties for approximately $315 million.

30. Also in November, 2013, Sears announced that it was laying off approximately 800 employees from its repair services and parts business.

Sears Declares Extraordinary Dividend Despite Significant Financial Losses

31. On November 19, 2013, Sears reported its third-quarter financial results. Sears' revenues for the third-quarter of 2013 were down 6.4% from the same quarter in 2012. Sears had a net loss of $48.8 million for the third quarter of 2013.

32. Nevertheless, on that same day, despite these losses, the Directors declared an extraordinary cash dividend of $5.00 per share on all common shares, or approximately $509 million in the aggregate, to be paid on December 6, 2013 (the "**Extraordinary Dividend**"). The primary beneficiaries of the Extraordinary Dividend were Holding and ESL.

33. The Extraordinary Dividend was declared by the Directors and paid by Sears with knowledge by the defendants of the substantial claim against Sears by the Hometown dealers in the Class Action.

34. The Extraordinary Dividend was declared by the Directors and paid by Sears with knowledge by the defendants that:

(a) Sears was aggressively liquidating its prime assets and would continue to do so in the future;

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

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

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

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

(f) the class members, which are independent owner operators of Sears Hometown stores, were experiencing and would continue to experience massive, unsustainable losses which would lead to their financial demise.

35. The defendants knew that by paying the Extraordinary Dividend, they would strip the most valuable assets out of Sears and that Sears would likely be bankrupt or insolvent by the time the Class succeeded in the Class Action.

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

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

38. Sears paid the Extraordinary Dividend on December 6, 2013.

The Continuing Path Towards Insolvency

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

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

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

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

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

44. In October, 2014, Ronald Boire was named as Mr. Campbell's replacement as CEO. Mr. Boire was Sears' third different CEO in just under two years.

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

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

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

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

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

50. 25% of the Hometown Dealer stores have closed since 2013. More Hometown Dealer stores are closing weekly.

51. The value of Sears' shares has dropped significantly on the Toronto Stock Exchange and on NASDAQ in the past 24 months and there is widespread speculation that Sears will file for bankruptcy protection in the near future.

Defendants Have Oppressed Class

52. Sears' actions in paying the Extraordinary Dividend were done for the purpose of denuding Sears of its prime assets, and paying the funds from the realization of the assets to the primary benefit of Holding and ESL to the detriment of the Class.

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

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

(a) effected a result;

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

(c) exercised their powers in a manner,

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

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

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

Service *Ex Juris*

57. The plaintiff is entitled to serve Holding, ESL and certain of the Directors outside Ontario without a court order pursuant to the following rules of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 because:

(a) Rule 17.02 (f)(i) – the claim relates to a contract made in Ontario;

(b) Rule 17.02 (f)(iv) – the claim relates to a breach of a contract committed in Ontario;

(c) Rule 17.02 (g) – the claim relates to a tort committed in Ontario;

(d) Rule 17.02 (h) – the claim relates to damage sustained in Ontario arising from a tort and breach of contract; and

(e) Rule 17.02 (o) – the defendants residing outside of Ontario are necessary and proper parties to this proceeding.

58. The plaintiff seeks to have this action tried immediately following the trial of the Class Action.

October 21, 2015

SOTOS LLP
Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, Ontario M5G 1Z8

David Sterns (LSUC # 36274J)
Louis Sokolov (LSUC #34483L)
Andy Seretis (LSUC # 57259D)
Rory McGovern (LSUC # 65633H)

Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the plaintiff

1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC., et al.
Defendants

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT MILTON

STATEMENT OF CLAIM

SOTOS LLP
Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns (LSUC#: 36274J)
Louis Sokolov (LSUC#: 34483L)
Andy Seretis (LSUC#: 57259D)
Rory McGovern (LSUC#: 65633H)

Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the Plaintiff

TAB 5

This is Exhibit **"5"** referred to in

the Affidavit of James Kay

sworn before me this 15th

day of January, 2018.

A Commissioner for taking Affidavits

Sotos

SOTOS LLP | LAWYERS & TRADE-MARK AGENTS

David Sterns
T 416.977.5229
dsterns@sotosllp.com

Assistant: Delita Nunes
T 416.977.5333 x 310
dnunes@sotosllp.com

Our File No. 20667

December 3, 2013

VIA EMAIL TO PHoward@stikeman.com FOR DELIVERY TO:

William C. Crowley
146 Central Park West, Apartment 10E
New York NY 10023
United States of America

Donald Campbell Ross
73 Donwoods Drive
Toronto ON M4N 2G6

Deborah E. Rosati
11821 Lakeshore Road RR#2
Wainfleet ON LOS 1 VO

James Mcburney
4 Luxemburg Gardens
London W6 7EA
United Kingdom

William R. Harker
39 Remsen Street- Apt. LB
Brooklyn NY 11201
United States of America

Ephraim J. Bird
1017 N. Ridge Road
Salado TX 76571
United States of America

R. Raja Khanna
31 Delaware Avenue
Toronto ON M6H 2S8

Douglas Campbell
13 Roxborough Street West
Toronto ON MSR 1T9

Dear Sirs and Madam:

Re: ***1291079 Ontario Limited v. Sears Canada Inc. et. al.***
Court File No. 3769/13 CP

We are counsel for the plaintiff in the above-captioned action (the "**Action**") brought against Sears Canada Inc. ("**Sears Canada**") under Ontario's *Class Proceedings Act, 1992* on behalf the "Sears Hometown" store dealers across Canada. A copy of the statement of claim in the Action is available at http://www.sotosllp.com/wp-content/uploads/2013/07/Statement-of-claim-Final.pdf.

We are writing to you as you are listed as a director of Sears Canada on the records of Industry Canada as of December 2, 2013.

On November 19, 2013, Sears Canada announced that its Board of Directors declared an extraordinary cash dividend of $5.00 ("**Extraordinary Dividend**") per share on all common shares of Sears Canada (totaling approximately $509 million), to be paid on December 6, 2013.

The declaration of the Extraordinary Dividend follows actions by Sears Canada to liquidate its most valuable assets and significantly reduce the scale of its operations. The declaration also follows the announcement of a loss by Sears Canada of approximately $50 million this past quarter and the recent resignation of Sears Canada's CEO Calvin McDonald who had been publicly committed to the continued operations of Sears Canada.

Despite statements by Sears Canada's management to the contrary, the view of informed observers is that Sears Canada is in the process of liquidating all or a substantial portion of its Canadian operations and paying out the proceeds of the liquidation to its shareholders. There is concern that Sears Canada is denuding itself of assets without reinvesting the proceeds into the corporation, and that this will eventually lead to a formal insolvency of Sears Canada to the detriment of actual and contingent creditors.

The *Canada Business Corporations Act*, RSC 1985, c C-44 ("**CBCA**") provides that a corporation shall not declare a dividend if, after the payment, the corporation would be unable to pay its liabilities as they become due or the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes. If a dividend is improperly declared, the directors of the company may face personal liability.

We have requested but have not received assurances from Sears Canada that, having regard to the assets and liabilities and actual and probable future losses of Sears Canada, it has set aside a sufficient reserve to satisfy a judgment against Sears Canada in the event that the Action will be certified as a class proceeding and will succeed on the merits, and satisfy other creditors.

The Action seeks damages of up to $100 million on behalf of several hundred small business owners. Should the declaration of the Extraordinary Dividend or any subsequent dividend declared by the Board result in Sears Canada being unable to satisfy in full an eventual judgment against Sears Canada in the Action, we may seek to hold each board member who authorized such dividend(s) jointly and severally liable with Sears Canada.

Yours very truly

SOTOS LLP

David Sterns

c. Peter Howard, Stikeman Elliott LLP (counsel for Sears Canada in the Action)

TAB C

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ELECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC. INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMTIED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC. and 3339611 CANADA INC.

(each an "**Applicant**") and collectively the "**Applicants**")

AFFIDAVIT OF JERRY HENECHOWICZ
(SWORN JANUARY 15, 2018)

I, JERRY HENECHOWICZ, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a Partner and Senior Vice-President with MNP LLP ("**MNP**") and as such I have personal knowledge of the matters stated in this affidavit, except where I have acquired such information from others or from documents attached hereto, in which case I believe such information to be true.

2. This affidavit is sworn in support of a motion seeking to, *inter alia* (a) appoint MNP as financial advisor to the Hometown Dealers (as defined in the Affidavit of James Kay); (b) direct

that the reasonable expenses and fees of MNP be paid from the estate of the Applicants; and (c) grant a charge in favour of MNP in the aggregate amount of $250,000.

3. MNP has prepared a report outlining its contemplated engagement and expertise, a copy of which is attached hereto and marked as **Exhibit "A"**.

4. I have reviewed the Monitor's Reports and prepared a summary of the Applicants' statements of receipts and disbursements through the CCAA proceeding to and including December 2, 2017, a copy of which is attached hereto and marked as **Exhibit "B"**. From my review of the Monitor's Reports, it appears that to December 2, 2017, professional fees drawn totaled approximately $46 million.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on January 15, 2018

Commissioner for Taking Affidavits
Alexandra Teodorescu

JERRY HENECHOWICZ

TAB A

This is **Exhibit "A"** referred to in the

Affidavit of

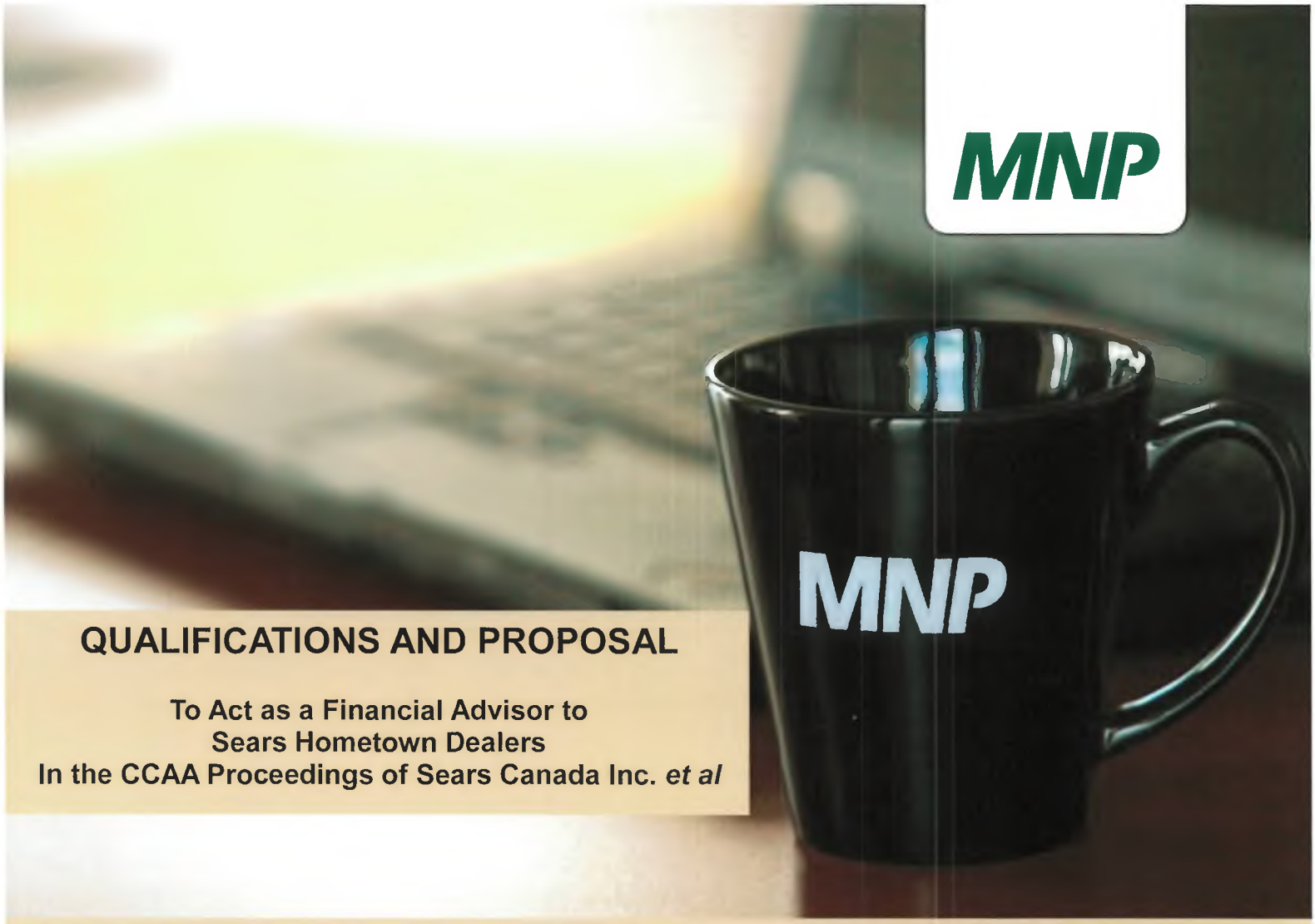
JERRY HENECHOWICZ herein,

Sworn before me

this 15th day of January, 2018.

A Commissioner for Taking Affidavits

Alexandra Teodorescu



QUALIFICATIONS AND PROPOSAL

To Act as a Financial Advisor to Sears Hometown Dealers In the CCAA Proceedings of Sears Canada Inc. *et al*

Prepared for:

Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5
Attention: Mr. Lou Brzezinski

Sotos LLP
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8
Attention: Mr. David Sterns

Date: **January 15, 2018**

Contact Information:

MNP LLP
300-111 Richmond Street West
Toronto, ON M5H 2G4

Jerry Henechowicz CPA, CA, CIRP, LIT
Senior Vice President/Partner, Financial Advisory Services
Phone: 416.515.3924
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January 12, 2018

Mr. Lou Brzezinski, Partner
Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, Ontario
M5C 3G5

-and-

Mr. David Sterns, Partner
Sotos LLP
180 Dundas Street West, Suite 1200
Toronto, Ontario
M5G 1Z8

Dear Mr. Brzezinski and Mr. Sterns:

Re: Sears Hometown Stores Dealers Claim in Sears Canada Inc., et al.'s Insolvency Proceeding

Thank you for inviting MNP LLP ("**MNP**") to act as your expert financial advisor to provide professional accounting, valuation and/or damage quantification, insolvency advice as well as information regarding the claim of the Sears Hometown Store dealers (the "**Dealers**") in Sears Canada Inc, et al.'s *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings. The purpose of this proposal letter (the "**Proposal**") is to provide a summary of our understanding of the facts to date, the scope of services to be provided, the terms of the contemplated engagement as well as our proposed engagement team's qualifications and experience.

BACKGROUND AND CONTEXT

Based on our discussions with you, our preliminary review of the information provided and other publicly available information regarding this contemplated engagement, our understanding of the facts to date are as follows:

- On July 5, 2013, 1291079 Ontario Limited (the "**Representative Plaintiff**"), represented by Sotos LLP ("**Sotos**") commenced a legal proceeding under the *Class Proceedings Act, 1992* and filed a Statement

of Claim[1] against Sears Canada Inc. ("**Sears Canada**" or the "**Defendant**") and Sears, Roebuck and Co. ("**Sears Roebuck**");

- On November 11, 2013, a Statement of Defense dated November 11, 2013 was filed with the Ontario Superior Court of Justice (the "**Court**") by Sears Canada and Sears Roebuck;
- On September 8, 2014, the Honourable Mr. Justice Gray issued his Reasons for Judgment and an Order certifying the action as a class proceeding (the "**Class Action**");
- On March 6, 2015, an Amended Statement of Claim, dated March 6, 2015 was filed with the Court, wherein Sears Roebuck was removed as a defendant in the proceeding;
- On April 21, 2015, an Amended Statement of Defense dated April 16, 2015 was filed with the Court by Sears Canada;
- The aforementioned class action proceeding relates to allegations that Sears Canada has taken inappropriate advantage of its position to the unlawful disadvantage of the Dealers. It is alleged that the contractual arrangements (the "**Dealer Agreement**") between Sears Canada and the Dealers represent a franchisor-franchisee relationship, and therefore Sears Canada has statutory obligations of good faith, fair dealing and disclosure towards the Dealers under the *Arthur Wishart Act* (Franchise Disclosure), 2000 Ontario (the "**AWA**") and other applicable provincial franchise legislation. The class action claims damages for breach of contract, negligent misrepresentation and breach of the AWA in the amount of $100,000,000.00;
- On August 10, 2016, the Representative Plaintiff brought a motion for partial summary judgment with respect to the Misrepresentation Damages (defined below) (the "**SJ Motion**");
- On November 30, 2016, the Honourable Mr. Justice Gray stayed the SJ Motion;
- On June 22, 2017, Sears Canada and related entities (the "**Sears Canada Entities**") filed for creditor protection under the CCAA and FTI Consulting Canada Inc. (the "**Monitor**") was appointed as monitor in the CCAA proceedings pursuant to the Initial Order of Justice Hainey. As set out in the Initial Application, the Sears Canada Entities proposed to initially close 14 Dealer Stores;

[1] 2014 ONSC 5190. Statement of Claim dated July 5, 2013.

- On October 13, 2017, the Court ordered the liquidation of all of Sears Canada's remaining stores and assets, including the authorization to conduct a liquidation sale of merchandise and furniture, fixtures and equipment located at the remaining Dealers;

- On December 8, 2017, the Court issued a Claims Procedure Order establishing March 2, 2018 as the claims bar date for ordinary unsecured creditors and a process to adjudicate the claims to be filed thereunder (the "**Claims Process**"). The ultimate realizations from the final liquidation of all of Sears Canada's assets and recoveries from other claims of Sears Canada's creditors may have against various other parties related to Sears Canada under the CCAA proceedings is uncertain at this time; and

- Sotos and Blaney McMurtry LLP ("**Blaneys**" and together with Sotos, collectively hereinafter referred to as the "**Dealers' Counsel**") are counsel to the Representative Plaintiff. The Dealers are bringing a motion that seeks the appointment of MNP as financial advisor to the Dealers for the primary purpose of quantifying the Dealers' economic damages and formulating an omnibus claim on behalf of the Dealers to be filed and adjudicated in the Claims Process.

DEALERS AND DAMAGE QUANTIFICATION METHODOLOGY

Types of Potential Damages Claims

Based on the Common Issues[2] identified, we understand that the above-noted Dealers could, depending on their circumstances, be entitled to a claim for one or more of the following three (3) types of damages:

1. Damages under the AWA, if accepted and/or proven, including damages for loss of profits/opportunity caused by misrepresentation/failure to disclose, and in particular, Section 5 and Section 7 of the AWA.
2. Damages for the breach of obligations under the Dealer Agreement, including the asserted obligation to exercise contractual discretion in accordance with the common law duty of good faith and fair dealing under the AWA; and/or
3. Damages from the termination of the Dealer Agreement under the CCAA proceedings for the remaining Dealers.

[2] As per Appendix A of the Honourable Mr. Justice Gray's Reasons for Judgement, dated September 8, 2014

Damage Quantification Methodology

We contemplate that the damage quantification methodology to be applied will employ multiple approaches and will differ and be dependent on the type of the potential damage claimed, as set out above. The initial phase of review will encompass the following:

a) Review of relevant documentation produced by the parties, including background submissions made in the certification of the class proceeding and the SJ Motion;

b) Discussions with the Dealers' Counsel and the Representative Plaintiff and/or other Dealers to gain an understanding of the particulars of the claim to be assembled and filed;

c) Consideration of the Common Issues[3] as they relate to the quantification of damages, taking into account the CCAA proceedings and anticipated Claims Process;

d) Preparation of a list of information required for our analysis of the various damages allegedly suffered by the Dealers and the parties holding such information;

e) Assisting counsel in the preparation of a questionnaire for all Dealers in the Class to establish the types and quantum of claims of individual Dealers, including requests for financial information, lease obligations, owner salaries and efforts to mitigate damages;

f) Seek the production of information and records from Sears Canada relating to sales volumes, commissions paid, Dealer files, etc.

g) Analysis of financial statements and other information and documents relating to the Dealers for a relevant number of years;

h) Research and analysis of industry financial benchmarks to determine a reasonable expectation of return on investment for the Dealers, as appropriate; and

i) Analysis of industry, economic and other external factors affecting the business operated by the Dealers, as applicable.

---

[3] As per Appendix A of the Honourable Mr. Justice Gray's Reasons for Judgement, dated September 8, 2014

Based on our investigations and review of the information provided, formulate a claim form taking into consideration the various metrics associated with each type of damage claim, as well as the diverse nature of the Dealers' operations, revenues, and cost structures.

Dealers will then all be contacted and provided with the claim form in order to prepare an omnibus claim submission in the anticipated Claims Process in the CCAA proceedings.

We note that the above approach could be subject to potential modification or change depending on the nature, quality and extent of the information that is able to be gathered once the engagement commences.

SCOPE OF WORK

Quantification of Damages

a) Based on damage quantification methodology and approach outlined above, prepare a comprehensive Expert Report quantifying the damages suffered by the Dealers. Our deliverable will be an independent and objective Expert Report, prepared in compliance with the professional practice standards of the Canadian Institute of Chartered Business Valuators.

Claim Submission and Adjudication in CCAA Proceeding

a) Assist the Dealers' Counsel in the preparation and submission of Dealers' omnibus claim in the Claims Process;

b) If necessary, review and provide comments on any disallowances notices issued by the Monitor under the Claims Process with respect to the Dealers' claim, and assist the Dealers' Counsel with respect to the filing of a Notice of Dispute on behalf of the Dealers detailing their dispute of the Monitor's assessment; and

c) If necessary, provide guidance to the Dealers' Counsel and/or expert testimony before the Court in the CCAA proceedings or the Claims Officer.

CRITICAL SUCCESS FACTORS

We deliver value through experienced resources and personal attention, and we would like to highlight some key factors that make us uniquely qualified to act as financial advisor to the Dealers:

1. **Retail and Franchise Expertise:** For over 50 years, MNP has had a proven track record for servicing all aspects of the Retail and Franchise sectors. At MNP, we understand the issues faced in this sector and we have the depth and breadth of expertise to effectively deliver business solutions to retailers and franchisors at any stage of their life cycle.

2. **Claims Quantification and Corporate Recovery and Insolvency Experience:** MNP has a long history of advising creditor groups and various other stakeholders in complex restructuring proceedings including analysis and preparation of omnibus claims by large groups of creditors.

3. **Pragmatic Approach:** Our approach for each assignment is designed to ensure our solutions and the resulting recommendations are not only valid and reliable, but also reasonable and viable.

4. **Personal Involvement:** Our philosophy and culture support continuous hands-on, personal involvement by our team. We work closely with our clients and their counsel to maximize efficiency and deliver results.

5. **One Point of Contact:** Who understands your needs, is responsive and has the technical expertise to navigate the Retail and Franchise sectors as well as the corporate recovery and insolvency environment.

6. **Excellent Client Service Satisfaction:** That is based on communication and responsiveness. We adhere to the highest standard of client service through efficient and effective planning, communication and management.

7. **Value for Money:** We maintain a lower cost infrastructure than othe national firms, allowing us to offer competitive rates. We endeavor to provide value for money through meticulous planning and execution of our engagement.

THE ENGAGEMENT TEAM

MNP offers the skills and experience of the following team to carry out the mandate of the project outlined. To achieve your objectives, you require professional, independent and objective assistance. We have assembled a talented team of professionals with the necessary experience and skills to accomplish this Engagement. We choose the most experienced and appropriate professionals to handle your assignment.

Our engagement team will be led by Jerry Henechowicz CPA, CA, CIRP, LIT and Sheldon Title CPA, CA, CIRP, LIT who are Senior Vice Presidents/Partners of MNP's Corporate Recovery and Insolvency Practice as well as Amanda Salvatori, CPA, CA, CBV and Catherine Tremblay, CPA, CA, CBV, ASA, CFF who are Partners of MNP's Valuation and Litigation Support Practice. It is anticipated that the team complement will include other professional staff, though assigned personnel may change throughout the engagement as deemed necessary by MNP.

Jerry Henechowicz, CPA, CA, CIRP, LIT
Senior Vice President/Partner – Corporate Recovery
T: (416) 515-3924 E: jerry.henechowicz@mnp.ca

Jerry Henechowicz, CPA, CA, CIRP, LIT is a Senior Vice President with MNP's Insolvency & Restructuring group, working out of Toronto. Following an extensive career in North American furniture manufacturing and distribution, he returned to public practice. Jerry possesses a wide range of practical industry experience, which allows him to recognize options and opportunities for all stakeholders within the statutory insolvency and restructuring framework.

He has considerable expertise providing advice to various creditor groups involved in CCAA engagements, corporate restructurings, and receivership proceedings, and in conducting asset/business sale transactions through insolvency proceedings. Some of Jerry's recent engagements include: acting as receiver of an Alberta based multi-property commercial and residential real estate developer; acting as Monitor in the CCAA wind-up of a $300 million multinational investment fund; and acting as a financial advisor to employee's representative counsel in the receivership and bankruptcy proceeding of a major Canadian retail chain.

Sheldon Title, CA, CIRP
Senior Vice President/Partner – Corporate Recovery
T: (416) 263-6945 E: sheldon.title@mnp.ca

Sheldon Title, CPA, CA, CIRP, LIT, is a Partner and member of MNP's Corporate Restructuring and Insolvency team. Working out of the Toronto office, Sheldon helps owner-managed and public companies overcome complex financial difficulties by developing practical strategies that meet the needs of key stakeholders.

With more than two decades of experience, Sheldon is well aware of the intricacies of corporate restructuring and insolvency and is adept at helping clients fully understand their options. His experience includes assisting companies in the real estate, retail, and manufacturing and distribution sectors, among others.

Sheldon has shared his knowledge in the Annual Review of Insolvency Law, Rebuilding Success Magazine and the Ontario Bar Association's Insolvency News and as a speaker at various industry and educational forums.

Designated a Chartered Accountant (CA) in 1985, Sheldon received the designations of Licensed Insolvency Trustee and Chartered Insolvency and Restructuring Professional (CIRP) in 1994. He has a Bachelor of Business Administration degree from York University. Committed to his profession, Sheldon is a member, and Past President of the Ontario Association of Insolvency and Restructuring Professionals' Board of Directors. Sheldon sits on the Commercial List Users' Committee.

Catherine Tremblay, B.Com., DPA, CPA, CA, CBV, ASA, CFE
Partner
T: (514) 228-7772 E: catherine.tremblay@mnp.ca

Catherine is a Partner in MNP's Montréal office. Specializing in business valuations and litigation support services, Catherine provides a wide range of business and securities valuation and financial litigation services, assisting public and private companies in a wide variety of industries.

Over the last several years, Catherine has been involved in valuation-related mandates encompassing corporate reorganizations, damages quantification and litigation, fair value measurement and purchase price allocation, goodwill impairment testing and intangible asset valuations.

Catherine has provided advisory services to the Québec Financial Markets Authority in purchase price allocation matters and financial reporting, has given expert witness testimony before the Québec Superior Court and the Expropriation Tribunal in Québec and has presented a number of conference papers.

Catherine was designated a Chartered Professional Accountant (CPA, CA) in 1996 after earning a Bachelor of Commerce degree from McGill University and a graduate diploma in public accountancy (DPA). She received a number of awards from McGill for outstanding academic achievements. Catherine was designated a Chartered Business Valuator (CBV) in 2002 and an Accredited Senior Appraiser (ASA) in 2006. She was a member of the Board of Directors of the CICBV for three years (2014-2017) during which time she was Chair of the Communications Committee for two years.

Amanda Salvatori, CPA, CA, CBV
Partner
T: (416) 515-3852 E: amanda.salvatori@mnp.ca

Amanda Salvatori is a Partner in MNP's Valuation and Litigation Support practice. Amanda draws on 16 years of experience to deliver valuation advice and prepare reports for private and public companies in a wide range of industries in connection with business interruption litigation, shareholder and partnership disputes, matrimonial dissolution, financial reporting, tax and estate planning, income tax litigation and mergers and acquisitions.

Amanda has a Bachelor of Business Administration degree from Schulich School of Business and is a Chartered Professional Accountant (CPA), qualifying as a Chartered Accountant (CA), and a Chartered Business Valuator (CBV). She is a frequent speaker on the subject of business valuation and intangible asset valuation and has provided instruction to senior level professionals at a number of presentations and conferences including to the Canada Revenue Agency, MaRS, Federated Press and the Canadian Association of Gift Planners.

PROPOSED FEES

Fees for our financial advisory services are based on hourly rates for our professionals who will be involved in the Engagement. Our fees are not contingent on the outcome of the Dealers' omnibus claim or the CCAA proceedings generally, but are based on the estimated number of hours required to complete the mandate, timely delivery of services, experience of professionals assigned to the Engagement and our commitment to meeting required deadlines for our deliverables. The hourly rates for the professionals involved are as follows:

TEAM MEMBER	HOURLY RATES
Partner/Senior Vice President	$ 510 to $ 600
Senior Managers	$ 350 to $ 425
Manager	$ 275 to $ 325
Analysts	$ 215 to $ 275
Administrative Staff	$ 180 to $ 210

Although it is difficult to estimate our fees at this time, we initially estimate that our professional fees for this engagement up to the submission of the Dealers' omnibus claim in the CCAA proceedings could be between approximately $150,000 to $250,000 plus disbursements directly related to the engagement and applicable taxes. This estimate of fees may change as the actual time required to complete the services may be less or greater than that currently anticipated, subject to the terms of the court orders governing the claims process in connection with this matter. The time required may vary due to circumstances outside of our control, including previously undisclosed complexity, the extent and availability of records and interviewees, and the decisions of third parties. Moreover, the fee estimate assumes the full co-operation and assistance of Sears Canada and the Monitor.

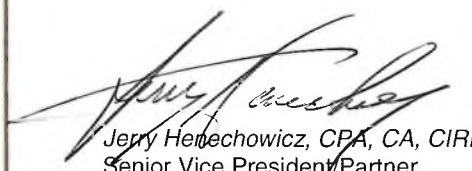
Our acceptance of this engagement is conditional upon the Dealers' Counsel obtaining a charge in the CCAA proceedings to cover MNP's accounts for this engagement, including payment terms for MNP's accounts during the course of MNP's engagement and the provision of a retainer of $50,000 by Sears Canada and/or the Monitor before we commence the assignment.

OTHER

Thank you for considering MNP for this engagement. We would be pleased meet with you to address any questions regarding our proposal that you may have.

Yours very truly

MNP LLP



Jerry Henechowicz, CPA, CA, CIRP, LIT
Senior Vice President/Partner
Corporate Recovery and Insolvency

TAB B

This is **Exhibit "B"** referred to in the

Affidavit of

JERRY HENECHOWICZ herein,

Sworn before me

this 15th day of January, 2018.

A Commissioner for Taking Affidavits

Alexandra Teodoresu

CCAA Proceedings of Sears Canada Inc. *et al*
Summary of Receipts and Disbursements as Reported by the Monitor
For the Period Ended December 2, 2017

	1-Jul-17	5-Aug-17	23-Sep-17	30-Sep-17	11-Nov-17	2-Dec-17	Total
Operating Receipts	**109.3**	**215.6**	**227.3**	**32.4**	**462.8**	**77.2**	**1,124.6**
Operating Disbursements							
Payroll and Employee Related Costs	(23.3)	(55.9)	(56.5)	(11.2)	(57.6)	(15.0)	(219.5)
Merchandise Vendors	(12.2)	(75.5)	(140.0)	(11.7)	(68.8)	(8.0)	(316.2)
Non-Merchandise Vendors	(11.8)	(30.5)	(43.3)	(5.9)	(44.5)	(16.3)	(152.3)
Rent and Property Taxes	(6.6)	(17.6)	(20.5)	(5.2)	(20.1)	(8.1)	(78.1)
Sales Taxes	(7.8)	(5.9)	(2.1)	(1.7)	(3.9)	(9.6)	(31.0)
Pension	(3.7)	(3.7)	(3.7)	(3.7)	(3.7)	0.0	(18.5)
IT Costs	0.0	(7.2)	0.0	(0.4)	(7.5)	0.0	(15.1)
Recovery of Expenses from Agent	0.0	3.0	6.4	0.0	15.3	17.2	41.9
Capital Expenditures	(0.4)	0.0	(0.3)	(0.1)	(0.1)	0.0	(0.9)
Total Operating Disbursements	**(65.8)**	**(193.3)**	**(260.0)**	**(39.9)**	**(190.9)**	**(39.8)**	**(789.7)**
Net Operating Cash Inlfows / (Outflows)	**43.5**	**22.3**	**(32.7)**	**(7.5)**	**271.9**	**37.4**	**334.9**
Professional Fees	(4.1)	(13.2)	(10.3)	0.0	(13.6)	(4.5)	(45.7)
Repayments of Existing Credit Facilities	0.0	(273.8)	(9.5)	0.0	0.0	0.0	(283.3)
DIP Fees and Interest Paid	(5.3)	(4.8)	(2.7)	0.0	(4.4)	(2.5)	(19.7)
Net Cash Inflows / (Outflows)	**34.1**	**(269.5)**	**(55.2)**	**(7.5)**	**253.9**	**30.4**	**(13.8)**
Cash							
Beginning Balance	126.5	160.6	48.3	43.1	43.2	78.4	126.5
Net Cash Inflows / (Outflows)	34.1	(269.5)	(55.2)	(7.5)	253.9	30.4	(13.8)
DIP Draws / (Repayments)	0.0	160.0	50.0	0.0	(218.7)	(23.3)	(32.0)
Other		(2.8)					
Ending Balance	**160.6**	**48.3**	**43.1**	**35.6**	**78.4**	**85.5**	**80.7**

TAB D

Updated Jan. 15, 2018 at 1:58 PM
Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ELECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

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Monitor

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Lawyers to the Board of Directors and the Special Committee of the Board of Directors of Sears Canada Inc.

AND TO: **KOSKIE MINSKY LLP**
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Representative Counsel for Active Employees and Retirees of Sears Canada Inc. with respect to pension matters regarding the defined benefit component of the Sears Pension Plan, the Supplemental Plan and the post-employment benefits

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Court File No. CV-17-11846-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED and **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC. *ET AL.***

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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

MOTION RECORD
(MOTION RETURNABLE JANUARY 22, 2018)

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