

Court File No. CV-18-00611219-00CL, CV-18-00611214-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

B E T W E E N:

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

Plaintiff

and

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

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

B E T W E E N:

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

Plaintiff

and

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

Defendants

**MOTION RECORD OF THE ESL PARTIES
(MOTION FOR PARTICULARS)**

February 7, 2019

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Tab 1

Court File No. CV-18-00611219-00CL, CV-18-00611214-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

B E T W E E N:

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

and

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

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

B E T W E E N:

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

and

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

**NOTICE OF MOTION
(MOTION FOR PARTICULARS)**

The defendants, ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP and Edward S. Lampert (the “**ESL Parties**”), will make a motion to The Honourable Mr. Justice McEwen on a date and a time to be set, at the Court House, 330 University Avenue, 7th Floor, Toronto, Ontario, M5G 1R7.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR

- (a) Orders requiring both the Monitor and the Litigation Trustee to provide better and further particulars in response to the ESL Parties' demands for particulars, dated January 18, 2019;
- (b) The costs of this motion; and
- (c) Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

- (d) On January 18, 2019, the ESL Parties served a demand for particulars on the Monitor, and the Litigation Trustee. Both plaintiffs failed to respond adequately.
- (e) The particulars the ESL Parties requested are material facts required for the ESL Parties to plead.

Monitor's claim

- (f) With respect to the Monitor's claim, there is no cause of action for a transfer at undervalue unless there are creditors whose claims Sears Canada intended to defeat and those same creditors remain unpaid. The Monitor has alleged that by paying the dividend in 2013 Sears Canada intended to defeat the then-present and future creditors of Sears Canada as a general body.
- (g) If the Monitor pleads that the Sears Canada directors intended to defeat creditors' claims outstanding at the time of the dividend but which were later repaid, the defendants are entitled to the defence that this intention cannot ground a claim under the transfer at undervalue provision. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 defines "creditor" as "a person having a

claim provable as a claim under this Act”. It is therefore a material fact that any of the then-present creditors have a claim in the Sears Canada CCAA proceeding.

(h) If the Monitor pleads that the Sears Canada directors intended to defeat creditors’ claims that arose *after* the dividend was declared and which remain unpaid, the defendants are entitled to the defence that the subsequent creditors’ claims were too remote in time to have figured in the contemplation of the directors, and therefore the directors could not have intended to defeat those subsequent creditors. Accordingly it is a material fact when the creditors’ claims arose.

(i) The ESL Parties do not know these material facts. The ESL Parties are entitled to full particulars under R. 25.06(8).

Litigation Trustee’s claim

(j) With respect to the Litigation Trustee’s claim, the statement of claim does not make out a coherent creditors’ cause of action under the oppression remedy. Instead, it suggests at least two different possible cases to meet:

(i) If the Litigation Trustee pleads that the Sears Canada directors oppressed the interests of creditors’ whose claims existed on the date that the dividend was declared but which were later repaid, the defendants may plead that the creditors have no recourse to the oppression remedy. A repaid creditor has suffered no loss and has no cause of action.

(ii) If the Litigation Trustee pleads that the Sears Canada directors oppressed the interests of creditors whose claims arose *after* the dividend was declared and which remain unpaid, the defendants may plead two different defences. First, the affected creditors have no recourse to the oppression remedy because they had no reasonable expectations at the date the

alleged oppressive act occurred. Second, and alternatively, the expectations a subsequent creditor may legitimately claim to have depend upon the specific circumstances existing at the date the claims arose. This would include consideration of Sears Canada's then current financial condition, the risks associated with extending credit to the company that can be considered to have been assumed by the creditors, and the specific steps taken, if any, by the subsequent creditors to protect their own interests.

(k) The defendants are entitled to defend in response to a coherent statement of claim. The ESL Parties requested particulars to specify when the claims of any unpaid creditors arose and if those claims remain unpaid. The ESL Parties do not know these material facts. The Litigation Trustee refused to provide the requested particulars.

(l) In its response to the demand for particulars, the Litigation Trustee referred to “creditors” as including all “stakeholders” without particularizing each “stakeholder’s” claim. An adequate response would specify the nature of the claims of each “stakeholder”, the dates such interests arose, and the expectations that the affected stakeholders are alleged to have.

Other Grounds

(m) Rules 25.06, 25.10 and 57.03 of the *Rules of Civil Procedure*; and

(n) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(o) The pleadings exchanged in this proceeding;

(p) The demands for particulars;

- (q) The responses to the demands for particulars; and
- (r) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

February 7, 2019

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TO: **THE LITIGATION SERVICE LIST**

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

-and- ESL INVESTMENTS INC. et al.

Defendants

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

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

-and- ESL INVESTMENTS INC. et al.

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**NOTICE OF MOTION
(MOTION FOR PARTICULARS)**

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Tab 2

CV-18-00611214-00CL

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:



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

Plaintiff

and

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

Defendants

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.

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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.

Date December 19th 2018 Issued by Ray Williams Ray Williams, Registrar
Local Registrar

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330 University Avenue, 10th Floor
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CLAIM

1. The Plaintiff claims:
 - (a) damages on a joint and several basis in the amount of \$509 million,
 - (i) as against the Former Directors (as defined below) and Ephraim J. Bird (“**Bird**”) for breach of fiduciary duty, breach of the duty of care, and conspiracy;
 - (ii) as against the ESL Parties (as defined below), for inducing the Former Directors and Bird to breach their duties owed to Sears Canada Inc. (“**Sears Canada**”), knowing assistance, and conspiracy;
 - (b) in the alternative to paragraph (a) (ii) above, damages against the ESL Parties on a joint and several basis in the amount of \$402 million for inducing the Former Directors and Bird to breach their duties owed to Sears Canada, knowing assistance, and conspiracy;
 - (c) a declaration that the ESL Parties knowingly received the proceeds of a breach of fiduciary duty and/or were unjustly enriched, hold the proceeds of the Dividend (as defined below) in trust for Sears Canada and must disgorge the proceeds they received on account of the Dividend to Sears Canada;
 - (d) a declaration that the authorization and payment of the Dividend was oppressive and unfairly disregarded and was prejudicial to the interests of Sears Canada and its stakeholders and an Order setting aside the Dividend;

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- (e) punitive and exemplary damages;
- (f) pre-judgment and post-judgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (g) the costs of this proceeding, plus all applicable taxes; and
- (h) such further and other relief as to this Honourable Court may seem just.

Overview

2. In the early 2010s, Sears Canada was one of Canada's largest retailers. It operated more than 100 of its own full-line department stores, and had more than 25,000 employees.

3. However, Sears Canada was facing serious financial and operational challenges. Since 2007, its revenues and EBITDA had declined each year. In 2011, its management recognized that Sears Canada was falling behind its peers and identified a need to modernize its business in order to keep pace in an increasingly competitive retail environment. This required significant capital investment in order to refresh Sears Canada's stores and improve its e-commerce platform.

4. Despite these warnings, Sears Canada's board of directors ("**Board**") failed to authorize capital investments in the business. Instead, between 2005 and 2012, the company sold assets worth approximately \$2.86 billion and distributed approximately \$2.97 billion in capital to its shareholders.

5. The primary recipients of these distributions were Sears Holdings Corp. ("**Sears Holdings**"), the hedge fund ESL Investments, Inc. ("**ESL**") and its affiliates, and ESL's founder and proprietor, the billionaire investor Edward S. Lampert (collectively, the "**Significant Shareholders**").

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6. In late 2013, Sears Canada was in the midst of its worst year yet. Its revenues declined by more than \$300 million year-over-year and its operating losses reached almost \$188 million. In September, its CEO resigned in frustration at the refusal of the Board to allocate sufficient capital to implement a turnaround strategy.

7. At the same time, ESL was experiencing a liquidity crisis. Its investors had submitted billions of dollars in redemption requests, which it was having difficulty funding.

8. Over the course of the year, Sears Canada sold off a number of its most important assets (the “**Key Asset Sales**”): the leases underlying some of its largest and most lucrative stores. The Sears Canada directors involved in the Key Asset Sales included a number of former ESL employees who had been selected for their roles by Lampert. In addition, even though he was not an officer or director of Sears Canada, Lampert was personally involved in the negotiations concerning these transactions.

9. The Key Asset Sales generated extraordinary proceeds of approximately \$591 million. At a November 2013 meeting of the Board held at the offices of Sears Holdings’ lawyers in New York City, less than a week after the final sale closed (the “**November 2013 Meeting**”), Sears Canada’s management proposed a plan to distribute more than \$509 million to its shareholders through an extraordinary dividend (the “**Dividend**”).

10. The Board was not given any advance notice of the proposed Dividend: it did not even appear on the agenda for the November 2013 Meeting. Although the Board was given extensive materials by management, those materials did not address the proposed Dividend or any analysis of its potential impacts on Sears Canada’s business. Nor did the Board receive legal or financial advice in relation to it. Nevertheless, the Board authorized the payment of the Dividend.

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11. Lampert and ESL improperly used their influence with the Board to procure the Dividend, for the purpose of providing funds to the Significant Shareholders. In accordance with their shareholdings in Sears Canada, 79% of the Dividend was paid to Significant Shareholders.

12. The payment of the Dividend diverted funds from Sears Canada at a time when the Defendants knew, or ought to have known, that it would be in the best interests of Sears Canada to reinvest the funds in the business or to preserve liquidity to satisfy increasing losses and creditor claims. By mid-2017, Sears Canada had become insolvent, and, on June 22, 2017, it was granted protection under the *Companies' Creditors Arrangement Act* (the "*CCAA*"). Sears Canada has since liquidated its remaining assets and ceased operations, leaving massive unsatisfied debts owed to its unsecured creditors, including former employees and pensioners.

13. It was not until after the *CCAA* Proceeding (defined below) commenced that it was discovered that the declaration of the Dividend had taken place in improper circumstances.

14. The Plaintiff seeks to set aside the Dividend and seeks damages to compensate Sears Canada and therefore its creditors for the losses they have suffered as a result of the Dividend.

The Parties

15. The Plaintiff, Sears Canada, is a corporation incorporated under the laws of Canada, with its headquarters in Toronto.

16. Sears Canada is insolvent. It is an applicant in a *CCAA* proceeding commenced on June 22, 2017 (the "*CCAA Proceeding*"). By order dated December 3, 2018, the presiding court in that proceeding (the "*CCAA Court*") appointed the Honourable J. Douglas Cunningham, Q.C., as

Litigation Trustee for Sears Canada to pursue claims on behalf of Sears Canada and its creditors against third parties, including the Defendants.

17. The Defendant, ESL Investments Inc., is a corporation incorporated under the laws of Delaware, in the United States of America, with its headquarters in Bay Harbor Islands, Florida, in the United States of America. It is a hedge fund which operates through a number of subsidiary entities, namely: ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP. These entities are collectively referred to herein as “**ESL**”. As a whole, ESL was at all relevant times the largest shareholder of Sears Holdings.

18. The Defendant, Edward S. Lampert, is an individual residing in Indian Creek, Florida, in the United States of America. Lampert was the CEO of Sears Holdings from May 2013 to October 2018. Lampert owns and controls ESL, and has served as ESL Investments Inc.’s Chairman and Chief Executive Officer since he founded it in 1988. Collectively, ESL and Lampert are referred to herein as the “**ESL Parties**”.

19. The Defendant Ephraim J. Bird is an individual residing in Salado, Texas, in the United States of America. Bird was a director of Sears Canada between May 2006 and November 13, 2013, and its interim CFO, and later permanent CFO, from March 2013 until June 2016.

20. The Defendant Douglas Campbell (“**Campbell**”) is an individual residing in Toronto. Campbell was Sears Canada’s COO from November 2012 until September 24, 2013, and its CEO and a director from that date until October 2014.

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21. The Defendant William Crowley (“**Crowley**”) is an individual residing in New York, New York, in the United States of America. Crowley was the Chairman of Sears Canada’s Board in late 2013, and was a director of Sears from May 2005 to April 2015.

22. The Defendant William Harker (“**Harker**”) is an individual residing in New York, New York, in the United States of America. Harker was a director of Sears Canada from November 2008 to April 2015.

23. The Defendant R. Raja Khanna (“**Khanna**”) is an individual residing in Toronto. Khanna was a director of Sears Canada from October 2007 to August 2018.

24. The Defendant James McBurney (“**McBurney**”) is an individual residing in London, in the United Kingdom. McBurney was a director of Sears Canada from April 2010 until 2015.

25. The Defendant Deborah Rosati (“**Rosati**”) is an individual residing in Wainfleet, Ontario. Rosati was a director of Sears Canada from April 2007 to August 2018.

26. The Defendant Donald Ross (“**Ross**”) is an individual residing in New York, New York, in the United States of America. Ross was a director of Sears Canada from May 2012 until 2014.

27. The Defendants, other than the ESL Parties and Bird, are referred to herein as the “**Former Directors**”. All of the Former Directors were members of the Board during the November 2013 Meeting.

Lampert’s Purchase of Sears Holdings

28. In early 2005, the ESL Parties acquired a controlling share in the American retailer Sears, Roebuck & Co. (“**Sears Roebuck**”), the then-parent company of Sears Canada. After the

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acquisition, the ESL Parties established Sears Holdings to hold their stakes in Sears Roebuck and Kmart, another retailer.

29. Lampert appointed himself Chairman of Sears Holdings, and later made himself CEO. From 2005 onwards, he played a direct role in the formulation of Sears Holdings' business strategy.

30. Soon after the acquisition, Lampert replaced the existing senior management of Sears Roebuck, in many cases with former ESL executives. Appointments to key positions at Sears Holdings made by Lampert included:

- (a) Crowley, the President and COO of ESL, who became Sears Holdings' CFO;
- (b) Harker, the former General Counsel of ESL, who became Sears Holdings' General Counsel and Corporate Secretary;
- (c) Bird, the CFO of ESL from 1991 to 2002, who became a board member and the CFO of Sears Hometown and Outlet Stores, Inc., an important Sears Holdings subsidiary; and
- (d) Jeffrey Stollenwerck ("Stollenwerck"), a Vice President at ESL, who became Senior Vice President and then President of Sears Holdings' real estate business.

31. Over the last several years, Sears Holdings has closed hundreds of Kmart and Sears stores and laid off thousands of employees. On October 15, 2018, Sears Holdings filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code.

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32. By 2013, Sears Canada was an independent public company and was no longer a Canadian operating subsidiary of Sears Holdings.

Lampert's Involvement in the Operations of Sears Canada

33. As he had at Sears Holdings, Lampert took a direct role in developing Sears Canada's business strategy.

34. The ESL Parties had significant direct shareholdings in Sears Canada. As of November 2013, the ESL Parties beneficially owned more than 28.1 million Sears Canada shares, amounting to 27.6% of its outstanding shares.

35. Lampert influenced the appointment of Sears Canada's management, including its chief executive officers. This included the appointment of Bird, a former ESL executive.

36. Crowley was appointed as the Chairman of the Board of Sears Canada in 2006, and Harker became a director in 2008. Bird was appointed as a Sears Canada director from 2006 to November 13, 2013, when he resigned from the Board but stayed on as the company's CFO.

Sears Canada's Financial and Operational Problems

37. Between 2011 and 2013, Sears Canada suffered aggregate operating losses of more than \$310 million.

38. As early as September 2011, the company's 2011-2014 Strategic Plan (the "**Strategic Plan**") explained that "Sears Canada requires a full transformation to be able to compete and win in the increasingly competitive Canadian retail environment."

39. Management provided the Board with regular updates on Sears Canada's operations, including the progress of the Strategic Plan. A March 2012 presentation to the Board noted that:

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“Customer and employee perceptions have been in decline, yet to find bottom”, “Sears is ... failing to connect with the next generation”, and “[we h]ave underinvested recently in stores”.

40. In September 2013, Sears Canada’s CEO, Calvin McDonald (“**McDonald**”), resigned. McDonald later told the press that he had left in frustration at not being able to take the steps necessary to save the company, as a result of Lampert’s refusal to authorize investments in Sears Canada’s business. McDonald stated that “there was not a real long term commitment to save this business”.

41. The minutes of Sears Canada’s September 23, 2013 Board meeting summarize a presentation given by Douglas Campbell, Sears Canada’s then-COO, which noted that “At current trends, the projection for 2016 EBITDA will be -\$105 million”, and that sales “continue to decline across the business at 2.6%”. Campbell joined the Board the following day.

42. At the same meeting, the Board received a presentation on the Strategic Plan, which explained that the company’s e-commerce system was “seriously substandard”, and advised that “To catch competitors, significant investment and transformation is required.”

43. By October 2013, the Board was well aware of the problems facing Sears Canada and that its long term viability was at risk. In the circumstances, it was obvious to the Board that Sears Canada urgently needed capital to invest in its business or to preserve value to satisfy its rapidly growing losses and liabilities.

44. However, instead of investing in Sears Canada’s business or preserving value to fund liabilities and increasing losses, the Former Directors authorized a plan under which the company sold off its most lucrative assets and sent the proceeds directly to its shareholders.

The Dividend Plan

ESL's Need for Liquidity to Satisfy Redemptions

45. In 2012, ESL received a large number of redemption requests from its investors. These requests totaled approximately \$3.5 billion (US), an amount equal to more than half of ESL's total assets under management at the time. The redemptions were payable in 2013.

46. ESL did not have sufficient cash on hand to satisfy its investors' demands. As a result, it was forced to liquidate significant portions of its portfolio and to pay in-kind redemptions, made up of shares of the companies it owned.

47. To help ESL fund the redemptions, Lampert devised a plan to cause Sears Canada to make a large dividend payment, the majority of which would go to the Significant Shareholders. ESL would use the cash it received to fund redemptions, or distribute its Sears Holdings shares, which would be increased in value as a result of the Dividend, to its own investors as in-kind redemptions.

Sale of Sears Canada's Assets

48. As a result of its large operating losses, Sears Canada did not have sufficient cash on hand to fund a large dividend payment. The only way it could raise the necessary funds was to liquidate a number of its "crown jewels": the long-term under-market-value leases for its largest and most lucrative stores.

49. Sears Canada had liquidated many of its assets since being acquired by the ESL Parties in 2005. However, in that context, the 2013 Key Asset Sales were notable for their size and impact on Sears Canada's operations.

50. Over the course of 2013, Sears Canada sold seven of its most valuable leases for approximately \$591 million. The sales were carried out in two transactions:

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- (a) the sale of two leases – at the Yorkdale Shopping Centre in Toronto and the Square One Mall in Mississauga – to Oxford Properties Group in June 2013 for \$191 million; and
- (b) the sale of five leases – its flagship store in the Toronto Eaton Centre and four other large stores (two in the Greater Toronto Area, and one each in London, Ontario and Richmond, BC) – in November 2013 to Cadillac Fairview Corporation Limited for \$400 million (the “**Cadillac Fairview Sale**”).

51. Sears Canada also reached an agreement, in early November 2013, to sell its 50% interest in a group of eight Quebec shopping centres to Montez Income Properties Corporation for \$315 million. That transaction closed in January 2014.

52. Lampert played a direct role in negotiating the Key Asset Sales, even though he was not a director or an officer of Sears Canada. He provided direct instructions to Sears Canada on the price sought by Sears for the Key Asset Sales. Among other things, Lampert personally directed the negotiation strategy in connection with the Cadillac Fairview Sale. Stollenwerck, a senior executive at Sears Holdings’ real estate division and a former ESL employee, was the primary negotiator for Sears Canada, even though he was not a Sears Canada employee.

53. The Former Directors and Bird knew that the Key Asset Sales would significantly reduce Sears Canada’s earnings capacity, since the stores being closed were some of the company’s most valuable locations. A presentation to the Board (which at the time included Bird) at its September 2013 meeting projected a significant loss in earnings as a result of the liquidation of four of the large stores that were ultimately included in the Cadillac Fairview Sale.

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The Dividend Proposal

54. At the same time the Cadillac Fairview Sale was closing in November 2013, three former ESL employees – Bird, Crowley, and Harker – worked to finalize the proposal for a large extraordinary dividend. Over the course of the ten-day period from November 8 to 18, 2013, Bird, Crowley and Harker settled on a proposed dividend payment of \$5 per share, or more than \$509 million in total.

55. At the time, the Significant Shareholders owned more than 79% of Sears Canada's outstanding shares, and therefore stood to receive a total of approximately \$402 million from a \$5 per share Dividend.

Lack of Notice and Undue Haste

56. The Cadillac Fairview Sale closed on Tuesday, November 12, 2013. The Dividend was approved at a board meeting held less than a week later, on the following Monday and Tuesday, November 18-19, 2013.

57. No information about or notice of the proposed Dividend was provided to the Board by Sears Canada's management in the lead-up to the meeting. Indeed, the Dividend was not even referred to in the agenda for the November 2013 Meeting.

58. Approval of the Dividend was treated as a foregone conclusion by Bird, Crowley and Harker. Although, as discussed below, the Board was not presented with any financial analysis of the Dividend, the minutes of the November 2013 Meeting note that the Board was “presented [with] a draft press release relating to the dividend” at the beginning of their discussion.

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59. Notwithstanding the fact they did not receive adequate notice of the proposed Dividend before being asked to vote on it, the Former Directors did not seek any information or advice about the proposal before they approved it.

Insufficient Information Provided to the Board

60. The Board was not given sufficient information to understand the impact of the Dividend, nor did they seek additional information from management.

61. Extensive background materials (the “**Materials**”) were prepared by management and given to the Board before the November 2013 Meeting. However, the Materials did not contain any analysis of the Dividend. In fact, the Materials contained no references to the Dividend at all. The financial and operational plans included with the Materials also omitted any reference to the Dividend and failed to account for the Dividend in their calculations.

62. Even though Crowley, Bird, and Harker had previously undertaken a financial analysis of various Dividend scenarios in the weeks leading up to the declaration of the Dividend, none of their findings were presented to the Board.

63. Without even basic financial information or any professional advice, the Board was not in a position to properly assess the Dividend, even if it had tried or wanted to do so, which it did not.

Lack of Governance Procedures

64. The procedures adopted by Sears Canada’s Board at the November 2013 Meeting were manifestly insufficient for a transaction as large as the Dividend, particularly in light of Sears Canada’s precarious financial and operational position at the time.

65. The Board did not, *inter alia*:

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- (a) seek advice from outside legal counsel;
- (b) commission any analysis from financial, accounting, or other advisors; or
- (c) convene an *in camera* session of the independent directors to discuss the Dividend prior to its approval.

66. The failure to take any of these steps before approving the Dividend differed from the Board's conduct with respect to previous dividends and failed to comply with proper governance procedures.

67. For example, before authorizing the payment of two smaller dividends in 2010, the Board implemented a number of significant governance procedures.

68. In 2010, Sears Canada's management provided the Board with a series of capital structure presentations, which were updated several times. These presentations explained the benefits and risks of returning capital to the Company's shareholders and included both extensive financial analysis and in-depth discussions of potential alternatives.

69. The proposed 2010 dividends were discussed during at least five separate board meetings between April and September 2010. The independent directors held an *in camera* meeting to discuss the dividend, and asked outside counsel to attend and provide information on the implications of the payment of an extraordinary dividend, as well as other potential options for use of the company's capital.

70. In November 2013, despite Sears Canada's far worse financial and operational situation, the Board did not conduct *any* of this due diligence. Instead, it approved the Dividend proposed

by Lampert's representatives in management and on the Board without any analysis of the implications to the company itself, or its minority shareholders, employees, creditors, or other stakeholders.

Sears Canada's Board Rubber-Stamps the Dividend Payment

71. After authorizing the liquidation of its most valuable assets, the Board failed to ensure that the proceeds were used for Sears Canada's benefit or to ensure that sufficient value would be available to satisfy creditor claims that would continue to accumulate as losses increased.

72. To the contrary, the Former Directors, almost immediately and without scrutiny or evaluation, decided to dividend out almost all of the money that Sears Canada earned from the Key Asset Sales.

73. The Former Directors could not have reasonably concluded that the Dividend was in Sears Canada's best interest based on the extremely limited information available to them at the time they approved the Dividend. Indeed, the Dividend was not in Sears Canada's best interest. By approving the Dividend, the Former Directors breached their common law and statutory obligations to Sears Canada.

Effects of the Dividend

74. Payment of the Dividend caused serious harm to Sears Canada and its stakeholders.

75. The funds used to pay the Dividend were derived from the sale of leases for some of Sears Canada's largest and best-performing stores, which were located in some of Canada's most densely populated areas. These divestments brought about a significant decline in Sears Canada's revenue-generation capacity without any corresponding long-term investment in its operations.

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76. The main beneficiaries of the Dividend were Sears Holdings, ESL, and Lampert. Sears Canada did not receive any benefit from the Dividend.

77. After three more years of enormous losses, Sears Canada became insolvent in 2017. It has since liquidated all of its remaining inventory and assets and closed all of its stores. Sears Canada's liquidation has cost more than 15,000 employees their jobs, and has left its creditors with hundreds of millions of dollars in uncollectable debts.

The CCAA Proceeding

78. On June 22, 2017, Sears Canada and a number of its affiliates commenced the *CCAA* Proceeding.

79. Although the existence of the Dividend was known at the time it was paid, prior to the commencement of the *CCAA* Proceeding, the circumstances surrounding the Board's authorization of and the ESL Parties' involvement in the Dividend were not known to anyone other than Sears Canada's senior management and directors, and the Significant Shareholders.

80. These facts, including Lampert's involvement in the sale of the real estate assets, the non-independent Directors' role in the plan to declare the Dividend, and the absence of information and manifestly inadequate governance procedure at the November 2013 Meeting, were not known and were only uncovered after the *CCAA* Proceeding commenced.

The Claims

81. The facts surrounding the authorization and payment of the Dividend give rise to a number of claims by Sears Canada against the Former Directors, Bird, and the ESL Parties.

The Former Directors and Bird: Breaches of Duties and Oppression

82. The Former Directors breached their common law and statutory duties of care and fiduciary duties by:

- (a) authorizing the Dividend in circumstances where it was not in the best interests of Sears Canada, thereby favouring the interests of the Significant Shareholders over those of the company and its other stakeholders; and
- (b) failing to exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances by, among other things, neglecting to obtain any information or professional advice about the impact on the business of Sears Canada in paying the Dividend, or in the alternative investing the \$509 million into its business or preserving this value to satisfy liabilities, before agreeing to authorize it.

83. Although Bird was not a director of Sears Canada at the time the November 2013 Meeting was held, he had been a director until immediately prior to the meeting. Bird attended the November 2013 Meeting in his capacity as chief financial officer of Sears Canada, and as such, he continued to owe fiduciary duties and a duty of care and loyalty to Sears Canada after his resignation from the Board.

84. Bird breached the duties he owed to Sears Canada by:

- (a) proposing the Dividend in circumstances where the Dividend was not in the best interests of Sears Canada;
- (b) proposing the Dividend for the benefit of the Significant Shareholders;

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- (c) preparing and planning for the distribution of the Dividend without providing adequate information to the Board, in the hope that the Dividend would be declared by the Board;
- (d) withholding relevant financial information from the Former Directors that they required to properly analyze the merits of the Dividend, including information about Sears Canada's pension deficit; and
- (e) proposing and recommending the Dividend and then resigning from the Board before the November 2013 Meeting.

85. As a result of the breaches referred to in paragraphs 82 to 84 above, Sears Canada seeks to unwind the Dividend and seeks damages against the Former Directors and Bird in the amount of \$509 million.

86. Further, the Former Directors and Bird acted in an oppressive manner towards Sears Canada by:

- (a) disregarding the reasonable expectation of Sears Canada that their powers would be used for the benefit of the company, rather than for that of third parties like the Significant Shareholders; and
- (b) using their powers to authorize the Dividend, which was unfairly prejudicial to and disregarded the interests of Sears Canada and its creditors.

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87. It is appropriate for Sears Canada, by way of its Litigation Trustee, to be the complainant for an oppression claim on its own behalf and on behalf of its creditors, who are all similarly affected by the oppressive conduct described above.

88. As a result of the Former Directors' and Bird's oppression Sears Canada seeks an Order:

- (a) declaring that the Former Directors and Bird, breached their duties owed to Sears Canada;
- (b) setting aside the Dividend; and
- (c) ordering the Former Directors and Bird to pay damages to Sears Canada on a joint and several basis in the amount of \$509 million.

89. An order setting aside the Dividend, imposing a constructive trust over those funds, and/or ordering compensatory payments in the same amount would remedy the Former Directors' and Bird's oppression and return to Sears Canada the funds that rightly belong to it, for the ultimate benefit of its creditors.

The ESL Parties: Inducing Breaches of Duties; Knowing Assistance, Knowing Receipt, and Unjust Enrichment

90. The ESL Parties knowingly induced, encouraged, assisted and participated in the Former Directors' and Bird's breaches of fiduciary duty. They knew of the fiduciary duties the Former Directors and Bird owed to Sears Canada, and that the Dividend would harm Sears Canada. The ESL Parties nonetheless influenced and encouraged the Former Directors to authorize the Dividend for the ESL Parties' own benefit.

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91. But for the ESL Parties' inducement of and their assistance given to the Formers Directors' and Bird's breaches of their fiduciary duties to Sears Canada, those defendants would not have been put in circumstances where the breach of their duties in this manner was possible.

92. The ESL Parties knowingly assisted the Former Directors and Bird to take the wrongful step of authorizing and encouraging the Dividend, which resulted in prejudice to Sears Canada's rights, in circumstances where there was no right in the circumstances for the Former Directors and Bird to take such steps.

93. The ESL Parties are liable to Sears Canada for damages in the amount of \$509 million for inducing breaches of fiduciary duties and knowing assistance in the Former Directors' and Bird's breaches of their duties.

94. In the alternative, the ESL Parties are liable for disgorgement in the amount of \$140.8 million for knowingly receiving the proceeds of the Former Directors' and Bird's breaches of fiduciary duty.

95. In addition, or in the further alternative, the ESL Parties were unjustly enriched by receiving \$140.8 million by way of the Dividend in circumstances where it should not have been approved. The Dividend was paid gratuitously as a benefit to the ESL Parties, and caused a corresponding deprivation to Sears Canada. There was no juristic reason for the ESL Parties to receive the Dividend.

96. The appropriate remedy for the ESL Parties' unjust enrichment is the imposition of a constructive trust in favour of Sears Canada over the portion of the Dividend received by them.

Conspiracy By All Defendants

97. All of the Defendants acted together to generate the funds for and authorize the Dividend to the benefit of the Significant Shareholders and to the detriment of Sears Canada. This was unlawfully carried out through the Former Directors' and Bird's breaches of the duty of care, fiduciary duties, and oppressive conduct, as planned and directed by the ESL Parties. This conduct was directed at Sears Canada in circumstances where the Defendants knew, or ought to have known, that damage to Sears Canada would result.

98. The Defendants knew, or ought to have known, that it was not in the best interests of Sears Canada to distribute over half a billion dollars to its shareholders at a time when capital needed to be re-invested in the corporation to arrest its decline or to preserve value to satisfy liabilities. Instead, the distribution of the extraordinary revenues generated by the Key Asset Sales to shareholders accelerated Sears Canada's decline, thereby damaging its interests in the short-, medium-, and long-term, and ensured that \$509 million did not remain to satisfy increasing liabilities.

99. The Defendants are liable to Sears Canada for damages in the amount of \$509 million for conspiracy.

Service *Ex Juris*, Statutes Relied Upon, and Location of Trial

100. The Plaintiff is entitled to serve any Defendants who reside outside Ontario without a court order because this claim relates to a tort committed in Ontario, and because the Defendants carried on business in Ontario.

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101. The plaintiff pleads and relies upon the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, sections 122, 238, and 241 and Rules 17(g) and 17(p) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

102. The plaintiff proposes that this action be tried in the City of Toronto.

December 19, 2018

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J. DOUGLAS CUNNINGHAM, Q.C.

-and- ESL INVESTMENTS INC., et al.

Plaintiff

Defendants

CV-18-00611214 00CL

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

Tab 3

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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

Plaintiffs

and

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

Defendants

DEMAND FOR PARTICULARS

The defendants Edward S. Lampert, ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP demand particulars of the following allegations in your statement of claim:

1. With respect to the relief requested in paragraph 1(d), namely a “declaration that the authorization and payment of the Dividend was oppressive and unfairly disregarded and was prejudicial to the interests of Sears Canada and its stakeholders”, identify:
 - (a) the “stakeholders” whose interests were allegedly oppressed; and
 - (b) the category of security holder, creditor, director, or officer into which each stakeholder fits.

2. With respect to the allegation in paragraph 86 that the “Former Directors and Bird acted in an oppressive manner towards Sears Canada by [...] using their powers to authorize the Dividend, which was unfairly prejudicial to and disregarded the interests of Sears Canada and its creditors”:

- (a) identify the dates on which the alleged acts of oppression occurred;
- (b) identify the “creditors” whose interests were prejudiced and unfairly disregarded;
- (c) of those creditors referred to in paragraph 2(b) of this demand for particulars, identify those creditors whose claims were unpaid at the date or dates that the alleged acts of oppression occurred; and
- (d) of those creditors referred to in paragraph 2(c) of this demand for particulars, identify those creditors whose claims remain unpaid.

3. With respect to the allegation in paragraph 86 that the “Former Directors and Bird acted in an oppressive manner towards Sears Canada by [...] using their powers to authorize the Dividend, which was unfairly prejudicial to and disregarded the interests of Sears Canada and its creditors”, identify:

- (a) the expectations of the “creditors” that are alleged to have been violated; and
- (b) the interests of the “creditors” that are alleged to have been unfairly prejudiced and unfairly disregarded.

4. With respect to the allegation in paragraph 87 that “[i]t is appropriate for Sears Canada, by way of its Litigation Trustee, to be the complainant of an oppression claim on its own behalf and on behalf of its creditors”:

- (a) identify the “creditors” of Sears Canada on whose behalf the Litigation Trustee acts as complainant;
 - (b) specify whether the creditors referred to in paragraph 4(a) of this demand for particulars are the same as the creditors referred to in paragraph 2(d) of this demand for particulars; and
 - (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 2(d) of this demand for particulars and the class of creditors referred to in paragraph 4(a) of this demand for particulars, identify the creditors that fall exclusively into each class.
5. With respect to the allegation in paragraph 89 that “setting aside the Dividend [...] would remedy the Former Directors' and Bird's oppression and return to Sears Canada the funds that rightly belong to it, for the ultimate benefit of its creditors”:
- (a) identify the “creditors” of Sears Canada who will benefit from the return of the 2013 dividend funds to the estate of Sears Canada;
 - (b) specify whether the creditors referred to in paragraph 5(a) of this demand for particulars are the same as the creditors referred to in paragraph 2(d) of this demand for particulars; and
 - (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 2(d) of this demand for particulars and the class of creditors referred to in paragraph 5(a) of this demand for particulars, identify the creditors that fall exclusively into each class.

January 18, 2019

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ESL Institutional Partners, LP

TO: The Litigation Service List

SEARS CANADA INC. by its litigation trustee
J. DOUGLAS CUNNINGHAM, Q.C..

-and- ESL INVESTMENTS INC., et al.

Plaintiffs

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

DEMAND FOR PARTICULARS

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Master I, LP, and ESL Institutional Partners, LP

Tab 4

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. Douglas Cunningham, Q.C.

Plaintiff

and

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

Defendants

RESPONSE TO DEMAND FOR PARTICULARS

The Plaintiff provides the following particulars in response to the defendants', Edward S. Lampert, ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP, Demand for Particulars, dated January 18, 2019:

1. **Particular(s) Requested:** With respect to the relief requested in paragraph 1(d), namely a "declaration that the authorization and payment of the Dividend was oppressive and unfairly disregarded and was prejudicial to the interests of Sears Canada and its stakeholders", identify:

- (a) the "stakeholders" whose interests were allegedly oppressed; and
- (b) the category of security holder, creditor, director, or officer into which each stakeholder fits.

1.1(a) **Response:** The stakeholders whose interests were oppressed by the authorization and payment of the 2013 Dividend are all of Sears Canada's stakeholders, including its creditors, landlords, employees, pensioners, and the holders of its securities (excluding the Significant Shareholders, as defined in the Statement of Claim) (collectively, the "Stakeholders").

1.1(b) **Response:** The categories into which the Stakeholders fit are set out in Response 1.1(a).

2. **Particular(s) Requested:** With respect to the allegation in paragraph 86 that the "Former Directors and Bird acted in an oppressive manner towards Sears Canada by [...] using their powers to authorize the Dividend, which was unfairly prejudicial to and disregarded the interests of Sears Canada and its creditors":

- (a) identify the dates on which the alleged acts of oppression occurred;
- (b) identify the "creditors" whose interests were prejudiced and unfairly disregarded;
- (c) of those creditors referred to in paragraph 2(b) of this demand for particulars, identify those creditors whose claims were unpaid at the date or dates that the alleged acts of oppression occurred; and
- (d) of those creditors referred to in paragraph 2(c) of this demand for particulars, identify those creditors whose claims remain unpaid.

2.1(a) **Response:** The oppressive conduct took place in later 2013, and in particular in November 2013 and early December 2013. Other than the dates of the November 2013 Board

Meeting, as alleged in paragraph 56 of the Statement of Claim, the precise dates on which oppressive conduct took place are known to the Defendants but not the Plaintiffs.

2.1(b) **Response:** The creditors referred to in paragraph 86(b) are all of the Stakeholders of Sears Canada.

2.1(c) **Response:** See above. If appropriate, further information may be provided as part of the discovery process.

2.1(d) **Response:** See above. This question is not relevant and in any event the requested information is not necessary for the Defendants to plead. If appropriate, further information will be provided as part of the discovery process.

3. Particular(s) Requested: With respect to the allegation in paragraph 86 that the “Former Directors and Bird acted in an oppressive manner towards Sears Canada by [...] using their powers to authorize the Dividend, which was unfairly prejudicial to and disregarded the interests of Sears Canada and its creditors”, identify:

- (a) the expectations of the “creditors” that are alleged to have been violated; and
- (b) the interests of the “creditors” that are alleged to have been unfairly prejudiced and unfairly disregarded.

3.1(a) **Response:** The creditors reasonably expected that the power of Sears Canada’s directors would be exercised: (i) in the best interests of the company, rather than in a way that favoured the interests of the Significant Shareholders; and (ii) in such a way as to preserve capital

for the use of Sears Canada and its business or to satisfy obligations to Stakeholders rather than diverting it to the company's shareholders.

3.1(b) **Response:** The interests of the creditors included Sears Canada's ability to satisfy the obligations and debts owed to the Stakeholders or that would be owing to them by Sears Canada and the preservation of capital for that purpose.

4. Particular(s) Requested: With respect to the allegation in paragraph 87 that "[i]t is appropriate for Sears Canada, by way of its Litigation Trustee, to be the complainant of an oppression claim on its own behalf and on behalf of its creditors":

- (a) identify the "creditors" of Sears Canada on whose behalf the Litigation Trustee acts as complainant;
- (b) specify whether the creditors referred to in paragraph 4(a) of this demand for particulars are the same as the creditors referred to in paragraph 2(d) of this demand for particulars; and
- (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 2(d) of this demand for particulars and the class of creditors referred to in paragraph 4(a) of this demand for particulars, identify the creditors that fall exclusively into each class.

4.1(a) **Response:** The creditors referred to in paragraph 87 are the Stakeholders.

4.1(b) **Response:** The creditors referred to in paragraph 87 are the Stakeholders.

4.1(c) **Response:** This question is not applicable.

5. Particular(s) Requested: With respect to the allegation in paragraph 89 that “setting aside the Dividend [...] would remedy the Former Directors’ and Bird’s oppression and return to Sears Canada the funds that rightly belong to it, for the ultimate benefit of its creditors”:

- (a) identify the “creditors” of Sears Canada who will benefit from the return of the 2013 dividend funds to the estate of Sears Canada;
- (b) specify whether the creditors referred to in paragraph 5(a) of this demand for particulars are the same as the creditors referred to in paragraph 2(d) of this demand for particulars; and
- (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 2(d) of this demand for particulars and the class of creditors referred to in paragraph 5(a) of this demand for particulars, identify the creditors that fall exclusively into each class.

5.1(a) **Response:** The creditors who would benefit from a return to Sears Canada of funds owed to it are all of the unsecured creditors of Sears Canada.

5.1(b) **Response:** The creditors referred to in paragraph 89 are the Stakeholders.

5.1(c) **Response:** This question is not applicable.

January 31, 2019

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

-and- ESL INVESTMENTS INC. et al.
Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

RESPONSE TO DEMAND FOR PARTICULARS

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Tab 5

CV-18-0061219-00CL

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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

Plaintiff

and

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

Defendants

STATEMENT OF CLAIM

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.

Ray Williams, Registrar

Date: December 19, 2018

Issued by

Ray Williams
Local registrar

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CLAIM

1 The Plaintiff, FTI Consulting Canada Inc., in its capacity as Court-appointed monitor of Sears Canada Inc. (**Sears**) in proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36 (the **CCAA**) (the **Monitor**) claims against the Defendants:

- (a) a declaration that the transfer of funds to the Defendants, ESL Investments Inc. (**ESL Investments**), ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, and Edward S. Lampert (**Lampert**), by means of a dividend of \$5.00 per share paid by Sears on December 6, 2013 (the **2013 Dividend**):
 - (i) was a transfer at undervalue for the purposes of section 96 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3 (the **BIA**), as incorporated into the CCAA by section 36.1 thereof (the **Transfer at Undervalue**); and
 - (ii) is void as against the Monitor;
- (b) an order that the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall jointly and severally pay to Sears the full amount of the 2013 Dividend, being approximately \$509 million in total;
- (c) in the alternative, an order that the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall jointly and severally pay to Sears the portion of the 2013 Dividend received by the Defendants, collectively;

- (d) in the further alternative, an order that each of the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall pay to Sears the amount of the 2013 Dividend that such Defendant received, or directly or indirectly benefitted from;
- (e) pre and post-judgment interest in accordance with the *Courts of Justice Act*, RSO 1990, c. C.43; and
- (f) costs of this action on a substantial indemnity basis.

The Parties

2 Sears and its affiliate companies obtained protection under the CCAA on June 22, 2017, and pursuant to section 11.7 of the CCAA, the Plaintiff was appointed as Monitor under the Initial Order. On December 3, 2018, the Monitor obtained authorization from the Court to bring this action.

3 The Defendant ESL Investments is a privately-owned hedge fund incorporated under the laws of Delaware with its principal executive offices located at 1170 Kane Concourse, Bay Harbor Islands, Florida. The Defendants ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP (collectively, and together with ESL Investments, **ESL**) are affiliates of ESL Investments.

4 The Defendant Lampert is an individual residing in Indian Creek, Florida. At all material times, Lampert controlled ESL, and has served as ESL Investments' Chairman and Chief Executive Officer since its creation in 1988.

5 The Defendant William Crowley was a non-independent director of Sears from March 2005 to April 2015, including at the time the 2013 Dividend was approved by the Sears Board and paid to Sears' shareholders.

6 The Defendant William Harker was a non-independent director of Sears from November 2008 to April 2015, including at the time the 2013 Dividend was approved by the Sears Board and paid to Sears' shareholders.

7 At all material times, including on November 18, 2013 through to December 3, 2013, Lampert and ESL held a controlling ownership interest in Sears Holdings Corporation (**Holdings**) and beneficially owned 55% of Holdings' outstanding shares. In turn, at all material times, Holdings held a controlling ownership interest in Sears. On October 15, 2018, Holdings filed for Chapter 11 protection from creditors with the United States Bankruptcy Court. Holdings is not a party to this action.

8 At all material times, including on November 18, 2013 through to December 6, 2013, Holdings and each of the Defendants other than Crowley was a direct or beneficial shareholder of Sears, and held the following ownership interests:

- (a) Holdings beneficially owned 51,962,391 shares in Sears, representing approximately 51% of the outstanding shares.
- (b) ESL beneficially owned 17,725,280 shares in Sears, representing approximately 17.4% of the outstanding shares, which were directly held as follows:
 - (i) ESL Partners, LP: 15,821,206 shares;
 - (ii) SPE I Partners, LP: 830,852 shares;
 - (iii) SPE Master I, LP: 1,068,522 shares;
 - (iv) ESL Institutional Partners, LP: 4,381 shares; and

- (v) CRK Partners, LLC (an affiliate of ESL Investments, Inc. that was voluntarily cancelled effective June 1, 2018 and is not a party to these proceedings): 319 shares;
- (c) Lampert owned 10,433,088 shares in Sears, representing approximately 10.2% of the outstanding shares; and
- (d) Harker owned 4,604 shares in Sears.

9 In this action, the Monitor seeks a declaration that the 2013 Dividend was a transfer at undervalue pursuant to section 96 of the BIA (as incorporated into proceedings under the CCAA by section 36.1 thereof) and is therefore void as against the Monitor, and it seeks payment from the Defendants who were parties and/or privies to the Transfer at Undervalue.

Sears' Operational Decline

10 Beginning in 2011, Sears' financial performance began to decline sharply. According to Sears' publicly-disclosed audited annual financial statements for 2010 – 2013 (as amended, in certain cases), Sears' revenues, operating profits/losses and gross margin rates were as follows:

Year	Total Revenues (\$ million)	Operating Profit (Loss) (\$ millions)	Gross Margin Rate
2010	4,938.5	196.3	39.3%
2011	4,619.3	(50.9)	36.5%
2012	4,300.7	(82.9)	36.7%
2013	3,991.8	(187.8)	36.2%

- 11 As early as 2011, Sears' management recognized that drastic, transformative action would be required for Sears to re-establish a foothold in the Canadian retail market. In the 2011 strategic plan (the **2011 Strategic Plan**) prepared for Sears' board of directors (the **Board**), then-Chief Executive Officer Calvin McDonald described the state of Sears as follows:

Sears Canada is not a good retailer. Our business is broken: trading is awkward and inefficient, we lack product and merchandising focus and we are becoming irrelevant to customers while losing touch with our core.

[...]

We lack many of the fundamental processes, structures and culture of a strong retailer. In short, we lack 'retail rhythm'. However, most of our challenges are self-induced, meaning we are in a position to fix them.

- 12 The 2011 Strategic Plan also made clear that if transformative action was not taken, Sears could not expect to re-emerge as a successful retailer: "If we do not innovate, we will cease to be relevant." More directly, the 2011 Strategic Plan warned that "the current trajectory of growth and margin decline would take EBITDA into negative territory if we do not take drastic action."

- 13 Notwithstanding the concerning operational trends identified in the 2011 Strategic Plan, Sears failed to take the necessary action to reinvigorate its business. Between 2011 and 2013, Sears consistently invested fewer resources on growth and transformational initiatives relative to its industry peers. In particular, the Board rejected multiple attempts by management, including in particular McDonald, to use Sears' capital to revitalize its business.

2013 Plan to Dispose of Real Estate Assets to Fund Dividends

- 14 By 2013, ESL Investments and Lampert had an immediate need for cash from Sears. ESL Investments had raised money from investors years earlier on terms that precluded these investors from redeeming their investment for a period of time. In 2013, this holding period had expired, investors were entitled to withdraw funds and ESL Investments faced significant redemptions.
- 15 In order to satisfy its redemption obligations, ESL and Lampert devised a plan to extract cash from Sears through (a) the disposition of its most valuable real estate assets, and (b) the payment of an extraordinary dividend for the benefit of ESL and Lampert (collectively the **Monetization Plan**).
- 16 To give effect to the Monetization Plan, Lampert personally directed the disposition of Sears' real estate assets in 2013. Lampert provided specific instructions to Sears on the price sought by Sears for its dispositions. The Monitor specifically denies Lampert's public statement on February 11, 2018:

While I take no issue with the decisions that the board of Sears Canada made with regard to dividends and certain real estate sales, I have to emphasize that I have never served as a director or officer of Sears Canada, so I don't have firsthand knowledge of their internal deliberations and the alternatives considered.

17 At all materials times, Lampert directed and acted in concert with officers and directors of Sears to implement the Monetization Plan, including in particular with Crowley (then Chair of the Sears Board), Harker (then a director of Sears), and E.J. Bird (then Chief Financial Officer of Sears). Jeffrey Stollenwerck (then President, Real Estate Business Unit of Holdings) was also engaged by ESL and Lampert on these matters. Lampert had a longstanding professional and personal relationship with each of them:

- (a) Crowley had acted as President and Chief Operating Officer of ESL Investments from January 1999 to May 2012, Executive Vice-President and Chief Administrative Officer of Holdings from September 2005 to January 2011 and Chief Financial Officer of Holdings for periods in 2005-2007;
- (b) Harker was an Executive Vice-President and General Counsel of ESL Investments from February 2011 to June 2012 and an officer of Holdings from September 2005 until August 2012, during which time he acted variously as General Counsel, Corporate Secretary and Senior Vice-President, among other roles;
- (c) Bird was the Chief Financial Officer of ESL Investments from 1991 until 2002; and
- (d) Stollenwerck was the President of the Real Estate Business Unit of Holdings from February 2008 to April 2018 and a Senior Vice President, Real Estate for Holdings from March 2005 to February 2008. Before joining Holdings, Stollenwerck had acted as Vice-President, Research at ESL Investments.

- 18 In accordance with the Monetization Plan, Sears entered into an agreement with Oxford Properties Group on or about June 14, 2013 to terminate Sears' leases at Yorkdale Shopping Centre and Square One Mississauga in exchange for a payment to Sears of \$191 million (the **Oxford Terminations**). The Oxford Terminations closed June 24, 2013.

September 2013 Board Presentations

- 19 On September 23, 2013, two years after the 2011 Strategic Plan, the Board received a series of management presentations directly addressing Sears' deteriorating operational and financial performance (the **2013 Board Presentations**). Among other things, the 2013 Board Presentations reported that:

- (a) sales continued to decline across Sears' business at a rate of 2.6% per year;
- (b) based on year-to-date current trends (and without appropriately accounting for stores closed in connection with the Monetization Plan), Sears' projected EBITDA by 2016 would be negative \$105 million; and
- (c) Sears was struggling operationally: "Basics not fixed".

- 20 Earlier that month, Board presentations had also recognized that competition in the Canadian retail space was increasing with Target's entry into the market. Target had opened 68 stores in Canada in the second quarter of 2013, and planned to open a further 124 stores in Canada by year end.

- 21 Following the 2013 Board Presentations, the Board knew or ought to have known that Sears' business was in decline and that its long term viability was at risk.

Continued Disposition of Real Estate Assets

- 22 In accordance with the Monetization Plan, Sears pursued an agreement with Cadillac Fairview Corporation Limited (**Cadillac Fairview**) to terminate five additional high-value leases (Toronto Eaton Centre, Sherway Gardens, Markville Shopping Centre, Masonville Place and Richmond Centre) (the **Cadillac Terminations**).
- 23 Lampert directed the negotiating strategy in connection with the Cadillac Terminations with a view to ensuring a dividend of the proceeds before the end of 2013. Crowley and Stollenwerck negotiated directly with Cadillac Fairview, including with respect to the final price of \$400 million.
- 24 On October 28, 2013, the Board approved the Cadillac Terminations. The Board was not advised of the role that Lampert, Crowley or Stollenwerk had played in negotiating the Cadillac Terminations. The Cadillac Terminations closed on November 12, 2013.
- 25 In the same period, Sears and Stollenwerck negotiated the sale of Sears' 50% interest in eight properties jointly owned with The Westcliff Group of Companies. Sears' 50% interest was sold to Montez Income Properties Corporation in exchange for approximately \$315 million (the **Montez Sale**).
- 26 The Sears Board approved the Montez Sale on November 8, 2013. The approval was made by written resolution and without an in-person board meeting.
- 27 The Montez Sale closed in January 2014.
- 28 The assets disposed of by Sears were its "crown jewels". It was plain that the divestment of these key assets in 2013, while Sears was struggling in the face of stiffer retail competition from Target and others, would have a dramatic negative impact on Sears. The negative impact in fact unfolded:

Year	Total Revenues (\$ million)	Operating Profit (Loss) (\$ millions)	Gross Margin Rate
2012	4,300.7	(82.9)	36.7%
2013	3,991.8	(187.8)	36.2%
2014	3,424.5	(407.3)	32.6%
2015	3,145.5	(298.3)	31.8%
2016	2,613.6	(422.4)	27.3%

29 Lampert directed Sears to complete each of the Oxford Terminations, the Cadillac Terminations and the Montez Sale. These dispositions were part of the Monetization Plan, and completed in order to provide ESL Investments with funds to address its redemption obligations.

The 2013 Dividend

30 On November 12, 2013, the same day Sears received \$400 million in proceeds from the Cadillac Terminations, Crowley directed Bird to move forward with an extraordinary dividend of between \$5.00 and \$8.00 per share.

31 On November 18 and 19, 2013, six days after the closing of the Cadillac Terminations, the Board held an in-person meeting (the **November Meeting**). Although Sears had no business operations in the United States, the November Meeting was held in New York City at the offices of Wachtell, Lipton, Rosen & Katz (**Wachtell**).

32 The November Meeting began with a short pre-dinner discussion on November 18 and continued with a full day session on November 19, 2013.

33 During the short pre-dinner discussion on November 18, 2013, the Board unanimously resolved to declare the 2013 Dividend, an extraordinary dividend of \$5.00 per common share, for an aggregate dividend payment of approximately \$509 million.

34 The circumstances surrounding the 2013 Dividend raise a series of red flags.

Lack of Notice to the Board

35 The Board had no advance notice that it would be asked to consider an extraordinary dividend at the November Meeting.

36 On Friday November 15, 2013, the Board was provided with a package of material for the November Meeting (the **Board Materials**). The Board Materials included a detailed agenda with 15 separate items for the Board to consider during the November Meeting.

37 Neither the agenda nor any of the other Board Materials made any reference to the fact that the Board would be asked to consider an extraordinary dividend or any dividend at all. Moreover, the possible payment of a dividend had not been tabled in any prior Board meeting in 2013.

Lack of Information

38 The Board was not provided with the information necessary to assess the appropriateness of an extraordinary dividend.

39 Unlike past instances in which the Board was asked to consider an extraordinary dividend, the Board Materials did not contain any financial or operational information regarding the payment of a proposed dividend. The Board did not receive:

- (a) any written materials regarding a proposed dividend or possible dividend structures;

- (b) any written presentation analyzing the impact the proposed dividend would have on Sears' business, including taking into account possible downside scenarios; or
- (c) any *pro forma* assessment of Sears' liquidity and cash flows following the payment of a dividend. Rather, the *pro forma* cash flows included in the Board Materials assumed that no dividend would be paid in either 2013 or 2014.

40 While Sears' management had identified the need to provide the Board with various cash flow analyses covering various dividend scenarios, the limited analysis that was done by management was incomplete and never presented to the Board.

41 Moreover, and unlike past meetings in which the Board had considered extraordinary dividends:

- (a) management did not prepare a written presentation to the Board on the proposed dividend and there was no written recommendation or proposal from management to the Board; and
- (b) the directors were not provided with legal advice with respect to their duties in connection with the declaration of a dividend.

Financial Uncertainty

42 On November 12, 2013, prior to the November Meeting, the Board received a financial update on the performance of Sears. Management reported that throughout the first three quarters of the year, Sears had negative net income of \$49 million (\$27 million worse than the same period in 2012) and negative total cash flow of \$26.3 million.

- 43 On November 14, 2013, the Investment Committee of Sears' Board was presented with material showing an estimated pension plan deficiency of \$313 million at December 2013. The members of the Investment Committee were Crowley, Harker and Bird. This fact was not presented to the Board at the November Meeting.
- 44 In advance of the November Meeting, the Board was provided with only high level *pro forma* cash flows for 2014. The cash flows were based on a 2014 Plan EBITDA of \$135 million, of which \$118 million was based on aspirational changes to the business that management hoped would result in financial improvement but that management and the Board should have known were unreasonably optimistic. Moreover, the *pro forma* cash flows presented to the Board assumed the receipt of proceeds of the Montez Sale even though the transaction had not closed. Again, no information was provided to the Board on the impact an extraordinary dividend would have on future investment opportunities and future cash flows.
- 45 The Board Materials did however include two analyst reports, both of which reviewed the financial circumstances of Sears and predicted its eventual failure:

Desjardins Capital Markets Report (October 30, 2013)

As long as consumers do not perceive that Sears Canada is going out of business and desert it, Sears may be able to manage its demise slowly over time, selling prime and non-core assets, and waiting for the elusive purchaser of 60–80 store locations to appear.

CIBC Report (November 4, 2013)

It is possible that SCC will simply operate its way into irrelevance, gradually selling off stores to stem the cash drain. That strategy would likely result in Sears occasionally cutting a special dividend cheque to all shareholders, not the worst way to create shareholder value. But that is dangerous to the operations, particularly as the primary, and most profitably flagship stores are vended.

A Conflicted Board

- 46 The 2013 Dividend was approved by the Board unanimously and without any abstentions.
- 47 Crowley and Harker participated in the Board's deliberations to pay the 2013 Dividend and approved the payment of the 2013 Dividend despite the fact that Sears had specifically determined that:
- (a) Crowley and Harker were not "independent" directors; and
 - (b) pursuant to National Instrument 52-110, Crowley and Harker had a material relationship with Holdings and/or ESL that could "be reasonably expected to interfere with the exercise of [their] independent judgment."
- 48 Further, Crowley did not disclose to the Board that he, Lampert and Stollenwerck were personally involved in the 2013 real estate divestitures or that the timetable and size of the proposed dividend was dictated by ESL Investment's need for funds. Rather, the Board was led to believe that Sears' management was responsible for the 2013 real estate divestitures. For example, Crowley expressly advised the independent members of the Board: "I do not think that the Board or the independents should attempt to insert themselves in the negotiations [of real estate transactions]. Bill [Harker] and I did not and do not do that."

49 Crowley and Harker in particular were focused on the interests of ESL and Lampert. Crowley and Harker failed to disclose the motivations of ESL and Lampert to the Board and the fact that both the real estate dispositions and 2013 Dividend were driven by the needs of ESL and Lampert, and not the best interests of Sears.

Departure from Past Governance Practices

50 The Board process for the 2013 Dividend represented a sharp departure from past practice of the Sears Board and ordinary standards of good corporate governance.

51 For example, in December 2005, the Board approved an extraordinary dividend. The process for approving that dividend included:

- (a) multiple Board meetings on September 7, 2005, September 14, 2005, and December 2, 2005 to discuss the merits and risks of a potential dividend in light of the company's operational needs;
- (b) multiple oral presentations from management and a dividend recommendation by the Chief Financial Officer;
- (c) separate meetings between the independent directors of Sears and the Chief Financial Officer to assess the company's financial state;
- (d) legal advice from both in-house and external counsel to the Board; and
- (e) review by the Board of draft press releases and an officer's certificate with respect to the dividend.

52 In May 2010, the Board approved another extraordinary dividend, again with the benefit of a robust process:

- (a) multiple meetings of the Board on April 23, 2010, May 7, 2010, and May 18, 2010 to discuss the merits and risks of a potential dividend in light of the company's operational needs;
- (b) separate meetings of the independent directors on May 7, 2010 and May 12, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operational needs;
- (c) multiple presentations by management, including a 40-page presentation dated April 23, 2010 and a subsequent 20-page presentation dated May 7, 2010, providing detailed analyses of excess cash and financial forecasts (with downside scenarios) for multiple dividend options;
- (d) a dialogue between management and the Board continuing over several meetings with respect to various options for a potential dividend;
- (e) consideration of multiple potential uses for excess cash, including cash dividends in various amounts, a substantial issuer bid and a normal course issuer bid; and
- (f) a deferral of half the proposed dividend pending a full assessment of the company's operational needs.

53 In September 2010, the Board approved a second extraordinary dividend for 2010. The process for approving that dividend included:

- (a) multiple meetings of the Board on or around August 23, 2010 and September 10, 2010 to discuss the capital structure of the company and the merits and risks of a potential dividend in light of the company's operational needs;

- (b) multiple presentations by management, including a "capital structure update" dated August 3, 2010 and a 32-page presentation assessing the capital structure of the company and potential dividend options, including financial forecasts and downside scenarios, which the Board reviewed in advance of approving the dividend; and
- (c) a separate meeting of the independent directors on or around September 8, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operational needs.

54 In December 2012, the Board approved a smaller extraordinary dividend. While not as fulsome as previous governance processes, the process for approving the 2012 dividend nonetheless included:

- (a) a meeting on December 12, 2012 which included thorough discussion and analysis of the impact of a potential dividend on available cash, EBITDA and total debt, the company's need to retain cash for operational uses, and downside scenarios in respect of a possible dividend;
- (b) a report entitled "Dividend Discussion" which was prepared by Sears' Chief Financial Officer and which the Board reviewed in advance of approving the dividend; and
- (c) a review of the draft officer's certificate with respect to the dividend by external counsel to the independent directors, and a dialogue with the Chief Financial Officer of Sears addressing counsel's comments.

55 In stark contrast, the 2013 Dividend was the first item of business at a pre-dinner discussion at the outset of the November Meeting and was declared without any adequate financial, operational or cash flow information upon which to exercise proper business judgment. It was dealt with before any of the planned presentations to the Board, which addressed Sears' financial results, or the reports on management priorities, asset valuations, operating efficiency and Sears' 2014 financial plan and without the benefit of any independent legal advice regarding the directors' duties in the circumstances.

56 The Board's inability to make a proper business decision in respect of the 2013 Dividend was apparent from the fact that one of the Board members, Ronald Weissman, had been appointed to the Board that day. Weissman, a resident of Texas, had no material prior dealings with Sears or knowledge of Sears' financial or operational circumstances upon which to base his decision to approve the 2013 Dividend.

The 2013 Dividend is a Transfer at Undervalue and Void

A Transfer at Undervalue

57 The 2013 Dividend provided no value to Sears and solely benefited its direct and indirect shareholders, including the Defendants ESL, Lampert and Harker. The amounts of the gratuitous benefit received by the Defendants were:

- (a) ESL : \$88,626,400;
- (b) Lampert: \$52,165,440; and
- (c) Harker: \$23,020.

58 The Defendants also caused approximately \$259 million to be paid to Holdings through the 2013 Dividend.

Non-Arm's Length Dealings

59 At all materials times:

- (a) Holdings was the controlling shareholder of Sears, was a related entity to Sears, and was not dealing at arm's length with Sears;
- (b) ESL and Lampert exercised both *de facto* and *de jure* control over Holdings. As Holdings stated in its 2013 Annual Report, Mr. Lampert had "substantial influence over many, if not all, actions to be taken or approved by our stockholders"; and
- (c) ESL and Lampert were not dealing at arm's length with Sears as a result of their direct and indirect beneficial control position in Holdings, which in turn held a controlling interest in Sears. Further, Holdings, ESL and Lampert collectively held more than 75% of Sears' shares. ESL, Lampert and Holdings (at the direction of ESL and Lampert) acted in concert with respect to the control of Sears, and specifically acted in concert and with a single mind to exercise influence over Sears in connection with the 2013 Dividend and the Monetization Plan.

60 As a result of these relationships, each of Holdings, ESL, Lampert, and Sears are related entities who are presumed not to have acted at arm's length in respect of the 2013 Dividend. ESL and Lampert used their position of control over Sears to direct and/or influence Sears and its directors to carry out the Monetization Plan and the 2013 Dividend.

Intention to defraud, defeat or delay Sears' creditors

61 The 2013 Dividend was effected by Sears for the sole purpose of satisfying the immediate financial needs of ESL Investments and Lampert and in reckless disregard of the interests of Sears' creditors. The 2013 Dividend was made with the specific intention

to prioritize the interests of Lampert and ESL over Sears' creditors and other stakeholders.

62 In particular, considering the surrounding circumstances, Sears knew but recklessly disregarded the fact that the 2013 Dividend would have a material adverse impact on its ability to continue as a viable business and pay its creditors. In particular, the 2013 Dividend was:

- (a) a non-arm's length transaction made outside the usual course of business;
- (b) paid in the face of significant outstanding indebtedness to Sears' creditors, including pensioners, in circumstances in which:
 - (i) Sears had no operating income to repay its debts, including to its pensioners and other creditors;
 - (ii) applying reasonable assumptions, the Board could only reasonably have expected Sears to be significantly cash flow negative from 2014 onwards; and
 - (iii) the Board had no real plan to repay such indebtedness;
- (c) paid in circumstances that raise a series of "red flags", including as a result of the following facts:
 - (i) the 2013 Dividend was declared with unusual haste and with no advance notice to the Board;
 - (ii) the 2013 Dividend was declared in the absence of proper Board materials and with a deficient corporate governance process;

- (iii) the Board received no independent legal advice to properly discharge its duties with respect to a material transaction involving related parties: Holdings, ESL and Lampert;
- (iv) the divestiture of Sears' crown jewel assets had an obvious negative impact on its business;
- (v) Sears had not addressed its negative cash flows or operational challenges despite years of effort;
- (vi) there were clear conflicts of interest within the Board and management at the time the 2013 Dividend was declared; and
- (vii) the 2013 Dividend was driven by Lampert, Bird as Chief Financial Officer of Sears, and Crowley and Harker as non-independent directors of Sears, in order to satisfy ESL Investments' urgent need for funds.

63 In March of 2014, the Board was presented with a proposal for a further, more modest dividend on short notice. The proposed dividend was not approved by the Board due to concerns about Sears' financial position, only three months after the payment of the 2013 Dividend.

64 Sears knew or recklessly disregarded the fact that the 2013 Dividend would defraud, defeat or delay Sears' creditors. Shortly after the 2013 Dividend, Crowley supported further dividends in an email to Harker, stating:

"... we cannot hold cash because we may watch the business spiral down and do nothing.... Keeping the cash to fund a dying business does not make sense."

65 The Transfer at Undervalue effected by means of the 2013 Dividend is therefore void as against the Monitor within the meaning of section 96 of the BIA.

ESL, Lampert, Crowley and Harker are Liable as Privies

66 The Defendants ESL, Lampert, Crowley and Harker were privies to the Transfer at Undervalue and are liable to Sears.

67 None of ESL, Lampert, Crowley or Harker was dealing at arm's length with Holdings or Sears. Each of them knew that the 2013 Dividend would benefit ESL and Lampert and each of them sought to cause or confer that benefit. Further, each of them received either a direct or indirect benefit from the 2013 Dividend.

Director Indemnities

68 In order to preserve any indemnity rights Harker or Crowley may have against Sears, the Monitor will agree that any recoveries received from Harker or Crowley in connection with this claim will be reduced by the amount of any distribution that Harker or Crowley, respectively, would have received on account of an unsecured indemnity claim from the Sears estate. The purpose of this adjustment is to make Harker and Crowley whole for any such indemnity claims while not requiring the Sears estate to reserve funds for such indemnity claims.

Service Ex Juris, Statutes Relied Upon, and Location of Trial

69 The Monitor is entitled to serve SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP without a court order pursuant to rule 17 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, because the claim is authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario (Rule 17.02(n)).

70 The Monitor pleads and relies on the BIA and the CCAA.

71 The Monitor proposes that the trial of this matter be heard in Toronto, Ontario.

December 19, 2018

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

FTI Consulting Canada Inc.,
in its capacity as Court-appointed monitor

and

ESL Investments Inc. *et al.*

Court File No.:

CU-18-00611219-00CL

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

STATEMENT OF CLAIM

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Lawyers to FTI Consulting Canada Inc.,
as Court-Appointed Monitor

Tab 6

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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

Plaintiffs

and

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

Defendants

DEMAND FOR PARTICULARS

The defendants Edward S. Lampert, ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP demand particulars of the following allegations in your statement of claim:

1. With respect to the allegation in paragraph 64 that “Sears knew or recklessly disregarded the fact that the 2013 Dividend would defraud, defeat or delay Sears' creditors”:
 - (a) identify the “creditors” Sears Canada intended to defraud, defeat or delay;
 - (b) of the creditors referred to in paragraph 1(a) of this demand for particulars, identify those having claims for an outstanding debt on the date the 2013 Dividend was declared;
 - (c) of the creditors referred to in paragraph 1(b) of this demand for particulars, identify those whose claims for an outstanding debt remain outstanding at the date hereof.

2. With respect to the allegation in paragraph 62 that “Sears knew [...] the 2013 Dividend would have a material adverse impact on its ability [...] to pay its creditors”:
 - (a) identify the “creditors” that Sears Canada knew would be adversely impacted by paying the 2013 dividend;
 - (b) specify whether the creditors referred to in paragraph 2(a) of this demand for particulars are the same as the creditors referred to in paragraph 1(c) of this demand for particulars; and
 - (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 1(c) of this demand for particulars and the class of creditors referred to in paragraph 2(a) of this demand for particulars, identify the creditors that fall exclusively into each class.

3. With respect to the allegation in paragraph 62(b) that the 2013 Dividend was “paid in the face of significant outstanding indebtedness to Sears’ creditors, including pensioners”:
 - (a) identify the “creditors” to whom Sears Canada was significantly indebted on the date the 2013 Dividend was declared;
 - (b) specify whether the creditors referred to in paragraph 3(a) of this demand for particulars are the same as the creditors referred to in paragraph 1(c) of this demand for particulars; and

- (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 1(c) of this demand for particulars and the class of creditors referred to in paragraph 3(a) of this demand for particulars, identify the creditors that fall exclusively into each class.

January 18, 2019

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

TO: The Litigation Service List

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor

-and- ESL INVESTMENTS INC., et al.

Plaintiff

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

DEMAND FOR PARTICULARS

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Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE
Master I, LP, and ESL Institutional Partners, LP

Tab 7

Court File No.: CV-18-611219-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

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

Plaintiff

and

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

Defendants

RESPONSE TO DEMAND FOR PARTICULARS

The Plaintiff FTI Consulting Canada Inc., in its capacity as Court-appointed monitor, provides the following particulars in response to the demand for particulars of the defendants Edward S. Lampert, ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP dated January 18, 2019:

1 **Particulars Requested:** With respect to the allegation in paragraph 64 that "Sears knew or recklessly disregarded the fact that the 2013 Dividend would defraud, defeat or delay Sears' creditors":

- (a) identify the "creditors" Sears Canada intended to defraud, defeat or delay;
- (b) of the creditors referred to in paragraph 1(a) of this demand for particulars, identify those having claims for an outstanding debt on the date the 2013 Dividend was declared;

- (c) of the creditors referred to in paragraph 1(b) of this demand for particulars, identify those whose claims for an outstanding debt remain outstanding at the date hereof.

1.1(a) Response: The creditors referred to are the present and future general body of creditors as a whole of Sears Canada Inc. at the time the 2013 Dividend was declared, including pension beneficiaries, and not any specific creditor or single creditor;

1.1(b) Response: This question is not relevant and in any event the requested information is not necessary for the Defendants to plead; see response 1.1(a). If appropriate, further information will be provided as part of the discovery process; and

1.1(c) Response: This question is not relevant and in any event the requested information is not necessary for the Defendants to plead; see response 1.1(a). If appropriate, further information will be provided as part of the discovery process.

2 Particulars Requested: With respect to the allegation in paragraph 62 that "Sears knew [...] the 2013 Dividend would have a material adverse impact on its ability [...] to pay its creditors":

- (a) identify the "creditors" that Sears Canada knew would be adversely impacted by paying the 2013 dividend;
- (b) specify whether the creditors referred to in paragraph 2(a) of this demand for particulars are the same as the creditors referred to in paragraph 1(c) of this demand for particulars; and

- (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 1(c) of this demand for particulars and the class of creditors referred to in paragraph 2(a) of this demand for particulars, identify the creditors that fall exclusively into each class.

2.1(a) Response: The creditors referred to are the present and future general body of creditors as a whole of Sears Canada Inc. at the time the 2013 Dividend was declared, including pension beneficiaries, and not any specific creditor or single creditor;

2.1(b) Response: This question is not applicable; see response 1.1(a); and

2.1(c) Response: This question is not applicable; see response 1.1(a).

3 With respect to the allegation in paragraph 62(b) that the 2013 Dividend was “paid in the face of significant outstanding indebtedness to Sears’ creditors, including pensioners”:

- (a) identify the “creditors” to whom Sears Canada was significantly indebted on the date the 2013 Dividend was declared;
- (b) specify whether the creditors referred to in paragraph 3(a) of this demand for particulars are the same as the creditors referred to in paragraph 1(c) of this demand for particulars; and
- (c) to the extent that there is a difference in membership between the class of creditors referred to in paragraph 1(c) of this demand for particulars and the class of creditors referred to in paragraph 3(a) of this demand for particulars, identify the creditors that fall exclusively into each class.

3.1(a) Response: The creditors referred to are the present and future general body of creditors as a whole of Sears Canada Inc. at the time the 2013 Dividend was declared, including pension beneficiaries, and not any specific creditor or single creditor;

3.1(b) Response: This question is not applicable; see response 1.1(a); and

3.1(c) Response: This question is not applicable; see response 1.1(a).

January 31, 2019

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TO: The Attached Service List

FTI CONSULTING CANADA INC. ESL INVESTMENTS INC., *ET AL.*
Plaintiff and Defendants

Court File No.: CV-18-611219-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at TORONTO

RESPONSE TO DEMAND FOR PARTICULARS

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

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

-and- ESL INVESTMENTS INC. et al.

Defendants

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

-and- ESL INVESTMENTS INC. et al.

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**MOTION RECORD OF THE ESL PARTIES
(MOTION FOR PARTICULARS)**

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