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

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

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

A N D 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

Court File No. CV-18-00611217-00CL

A N D B E T W E E N:

MORNEAU SHEPELL LTD. in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan

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, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Court File No. CV-19-617792-00CL

A N D B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

MOTION RECORD OF THE DEFENDANTS BIRD, CAMPBELL, CROWLEY, HARKER, MCBURNEY AND ROSS
(Returnable before the Honourable Justice McEwen on August 27, 2019)

August 23, 2019

CASSELS BROCK & BLACKWELL LLP
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Lawyers for the Defendants, Ephraim J. Bird, Douglas Campbell, William Crowley, William Harker, James McBurney and Donald Ross

TO: **Litigation Service List**

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TAB 1

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

A N D B E T W E E N:

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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

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Defendants

Court File No. CV-19-617792-00CL

A N D B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

NOTICE OF MOTION

(Motion to Vary Timetable, Returnable on August 27, 2019)

The Defendants Ephraim J. Bird, Douglas Campbell, William Crowley, William Harker, and James McBurney and Donald Campbell Ross (the "**Former Directors**") will make a Motion to Mr. Justice McEwen of the Commercial List on August 27, 2019 at 10:00 a.m., or as soon after that time as the Motion can be heard, at 330 University Avenue, 8th Floor, Toronto, Ontario.

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

THE MOTION IS FOR:

(a) an order abridging the time required for service of this Notice of Motion or, if necessary, validating and/or dispensing with service thereof;

(b) an order varying, amending or setting aside the timetable ordered by Justice McEwen in these actions on July 12, 2019 such that all further steps in the timetable are suspended pending either:

(i) a final determination of the Former Directors' application bearing Court File No. CV-19-623573-00CL for declaratory relief in respect of their insurance coverage for defence costs in these actions (the "**Insurance Coverage Application**") or, if this court declines jurisdiction, the determination of parallel proceedings for similar relief before the courts of Illinois; or

(ii) an agreement being reached to provide interim funding for the Former Directors' defence costs in these actions pending resolution of the Insurance Coverage Application;

(c) costs of this motion; and

(d) such further and other relief as counsel to the Former Directors may advise and as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

(a) The Former Directors have, thus far, sought and received insurance coverage in these actions under the relevant 2015-2016 directors' and officers' insurance policy issued to Sears Holdings Corporation for the benefit of directors of Sears Canada Inc. ("**D&O Policy**"). The primary insurer has thus far provided coverage for the Former Directors' defence costs pursuant to the D&O Policy;

(b) In May 2019, the first excess insurer under the D&O Policy denied coverage, asserting that a different policy period should respond instead;

(c) The Former Directors acted promptly to address these insurance coverage issues and avoid any impact they might have on the efficient progress of this litigation. This included promptly advising opposing counsel and the court and commencing the Insurance Coverage Application;

(d) The Insurance Coverage Application was commenced on July 11, 2019 and initially scheduled for a hearing on the merits on August 27, 2019;

(e) On July 12, 2019, Justice McEwen made an order approving a consent timetable negotiated by the parties (the "**Timetable Order**"). At the time the Timetable Order was made, the Former Directors' defence costs were still being funded by the primary insurer;

(f) On July 15, 2019, the primary insurer unexpectedly advised the Former Directors that coverage under their layer of the D&O Policy was completely exhausted and no further defence cost funding was available;

(g) On July 25, 2019, counsel to the excess insurer in the Insurance Coverage Application advised of their intention to challenge the Ontario court's jurisdiction to

hear the Insurance Coverage Application, likely requiring a delay in the determination on the merits;

(h) The exhaustion of coverage and delays in the Insurance Coverage Application are a material change in circumstances from when the Timetable Order was made, which require the order to be varied to avoid real prejudice which would otherwise result to the Former Directors;

(i) The plaintiffs have refused to consider any amendment to the Timetable Order and have insisted on the Former Directors' strict compliance irrespective of insurance coverage or availability of funding;

(j) The Former Directors have attempted to negotiate an interim funding arrangement with the insurers involved in the Insurance Coverage Application or call upon other excess insurers in the D&O Policy to provide "drop-down coverage". Thus far, no agreement has been reached;

(k) Indemnification from Sears Canada and the existence of insurance coverage to fund defence costs in proceedings such as these was critical to the Former Directors' decision to join the board of Sears Canada. Because Sears Canada is insolvent, the D&O Policy is the only means available to indemnify the Former Directors for their defence costs;

(l) Unless the Timetable Order is varied to provide for a pause in the proceedings while insurance coverage and/or interim funding is determined, the Former Directors will suffer extreme prejudice;

(m) Rules 2.01, 2.03, 3.02 and 59.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;

(n) Section 124 of the *Canada Business Corporations Act*, RSC 1985, c C-44; and

(o) Such further and other grounds as counsel to the Former Directors may advise and this Honourable Court may permit.

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

(a) the Affidavit of Donald Campbell Ross, to be sworn; and

(b) such further and other evidence as counsel to the Former Directors may advise and this Honourable Court may permit.

August 23, 2019

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

TO: **Litigation Service List**

FTI CONSULTING CANADA INC. J. DOUGLAS CUNNINGHAM, Q.C. MORNEAU SHEPELL LTD. 1291079 ONTARIO LIMITED Plaintiffs	-and-	ESL INVESTMENTS INC *et al.* Defendants	Court File No.: CV-18-00611219-00CL Court File No. CV-18-00611214-00CL Court File No. CV-18-00611217-00CL Court File No. CV-19-617792-00CL

ONTARIO
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PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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

TAB 2

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ONTARIO
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Defendants

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

A N D 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

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Court File No. CV-18-00611217-00CL

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Defendants

Court File No. CV-19-617792-00CL

A N D B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

AFFIDAVIT OF DONALD CAMPBELL ROSS

I, Donald Campbell Ross, of the City of Toronto, in the Province of Ontario, and the City of Bridgeport, Connecticut, MAKE OATH AND SAY:

1. I am one of the defendants in three of the four above-noted proceedings (collectively, the "**Actions**"). As such, I have knowledge of the matters contained in this Affidavit, except where I have stated such knowledge to be based on information and belief from others, in which case I verily believe such information to be true.

2. I was a director of Sears Canada Inc. ("**Sears Canada**") from May 2012 to April 2014. From 1988 to August 2013, I was a partner at Osler, Hoskin & Harcourt LLP practising primarily out of the firm's Toronto office, where I focused on domestic and cross-border mergers and acquisitions and corporate finance and advised senior management and boards of directors on corporate governance matters. Since September 2013, I have held a senior counsel position with the New York office of Covington & Burling LLP (**"Covington"**).

3. I have an undergraduate degree from the University of Toronto, a law degree from Osgoode Hall Law School, and a master's degree from the London School of Economics. I am also a member of Ontario and New York bars. I have been recognized for my work by numerous legal publications and organizations including Chambers Global, the Best Lawyers in Canada, the Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada, and the IFLR 1000.

Overview

4. I swear this affidavit in support of a motion that William Harker, William Crowley, E.J. Bird, Douglas Campbell, James McBurney and I (collectively, the "**Former Directors**") have brought to amend the existing timetable in the Actions and, in particular, to implement a "pause" in the Actions until insurance coverage issues are resolved.

5. I believe that the Actions are entirely without merit. The Former Directors have advanced strong and compelling defences to the Actions. A copy of the Statement of Defence in the Litigation Trustee Action is attached as **Exhibit "A"**. We are now at critical juncture in the litigation when significant work needs to be done by our counsel to defend us against the serious claims advanced in the Actions. The insurance coverage issues described below jeopardize our ability to make full answer and defence to these claims**.**

Critical Importance of Indemnification and Insurance Coverage

6. As a director of a public company such as Sears Canada, the existence of indemnification entitlements, including directors and officers' liability ("**D&O**") insurance, was critically important to me.

7. Sears Canada entered into an Indemnification Agreement with me in 2012, which provided me with comprehensive indemnification as a director, for among other things, all damages, costs, expenses and fees (including legal fees) incurred in respect of any civil action which I may be involved in by reason of having been a director of Sears Canada and for the advance of funds necessary to cover such costs, expenses and fees. A copy of the Indemnification Agreement is attached as **Exhibit "B"**.

8. As a director, I also received confirmation of the existence of the Company's D&O policies (the "**D&O Policies**") each year.

9. I always understood and expected that the combination of the Indemnification Agreement and D&O Policies would provide me with a comprehensive indemnity and protection for all costs, damages, liabilities and expenses, including legal costs in respect of any civil proceedings, which arose from or related to my role as a member of the board of directors of Sears Canada.

10. Without such indemnification entitlements and adequate D&O insurance, I would not have agreed to serve or continue to serve as a director of Sears Canada. This was particularly important for me given that I was not an employee or part of management of Sears Canada and did not derive any direct benefit from Sears Canada apart from the modest director fees paid.

11. Since Sears Canada is insolvent, it has failed to pay me any amount under my Indemnification Agreement. Accordingly, my only source of indemnification for defence costs and any damages in respect of the Actions is the D&O Policies.

Overview of Insurance Coverage Issues

12. In general terms, the coverage issues relate to a denial by QBE Insurance Corporation ("**QBE**") as insurer of Sears Holdings Corporation ("**SHC**") that it is required to provide coverage under a D&O policy issued in the 2015-2016 coverage year. QBE is the next-layer excess policy, providing US$15 million in coverage (the "**2015 QBE Policy**") in excess to a US$15 million primary policy issued by XL Specialty Insurance Company to SHC (the "**2015 XL Policy**").

13. QBE contends that a letter sent to Sears Canada and its directors in December 2013 constitutes a "Claim" under the policy and, therefore, any coverage that is to be provided should be provided by the D&O insurers in the 2013-2014 policy year.

14. In the 2013-2014 policy year, XL Insurance Company Limited ("**XL Insurance**") issued a US$25 million D&O policy to Sears Canada (Policy Number ELU129663-13) (the "**Sears Canada 2013 XL Policy**"), and XL Specialty Insurance Company (**"XL Specialty"**) issued a US$25 million D&O policy to SHC (the "**SHC 2013-2014 Policy**"). The Sears Canada 2013 XL Policy is subject to a "tie-in endorsement" that provides that both that policy and the SHC 2013-2014 Policy (collectively, the "**2013 XL Policies**") share a single, aggregate US$25 million limit. As such, the

aggregate exposure of XL Insurance and XL Specialty (collectively, "**XL**") under the 2013 XL Policies is US$25 million.

Notice to XL, QBE and Other D&O Insurers

15. QBE only advised of its position regarding the 2015-2016 policies in May 2019, more than six months after first being put on notice of the claims against the Former Directors.

16. Shortly after being retained as defence counsel on behalf of the Former Directors, Cassels Brock and Blackwell LLP ("**CBB**") wanted to ensure that the D&O insurers were fully aware of all actual and threatened claims that had been asserted against the Former Directors, even if actual litigation had not commenced. At that time, only the 1291079 Ontario Limited action (the "**129 Action**") had been commenced (in October 2015), but developments in the *CCAA* proceedings of Sears Canada and letters sent to Sears Canada and others by potential claimants led the Former Directors to believe that other litigation would likely be brought thereafter.

17. Accordingly, in March 2018, CBB gave notice to all D&O insurers of both Sears Canada and SHC in respect of the policy period that covered 2017-2018.

18. For approximately the next five months, the D&O insurers reviewed and considered the claims notices under the 2017-2018 policy period.

19. Over the summer of 2018, when it became apparent that confirmation of coverage was not going to occur as quickly as anticipated, the Former Directors jointly retained Covington to advise on insurance coverage, indemnification and matters related to SHC. As is the case with coverage matters, the Former Directors are liable to pay the cost of coverage counsel out of their own pocket. The D&O insurers are not paying such fees. This represents a very significant expense.

20. In the late summer of 2018, XL first took the position that coverage might be under the 2015 XL Policy, rather than the 2017-2018 policies. A copy of the letter from XL's external counsel to counsel for SHC dated August 24, 2018 setting out XL's position in respect of the policy period that may be applicable is attached hereto as **Exhibit "C"**.

21. As a result, on September 7, 2018, the other 2015-2016 insurers (including QBE) were notified that XL had taken the position that the action commenced against the Former Directors by 129 Ontario in October 2015 was a claim first made in the May 15, 2015 to May 15, 2016 policy period. A copy of the notice letter provided to QBE, along with other 2015-2016 Insurers, is attached hereto as **Exhibit "D"**.

22. On October 22, 2018, counsel for XL wrote to formally advise that it was prepared to pay defence costs, but under the 2015 XL Policy (which covered 2015-2016), rather than the 2017-2018 policy (the "**XL Coverage Letter**"). XL informed the Former Directors that its position was that all the claims in respect of which notice had been given constituted a single claim that was related to the 129 Action that was commenced in 2015.

23. On or about November 19, 2018, Covington informed QBE that XL had determined that the 2015 XL Policy responded to the claims made against the Former Directors in the Ontario Actions and that XL had agreed to pay defence expenses (as defined under the 2015 XL Policy).

24. By letter dated December 4, 2018, QBE made a detailed and lengthy request for documents and information relating to the Former Directors' claim for coverage. On January 2, 2019, through Covington, the Former Directors responded to QBE's requests. Additional detailed updates regarding the progress of the CCAA proceedings and other related litigation have been provided by Covington from time to time to QBE, XL, and other insurers in the 2015-2016 insurance tower.

25. Over the fall of 2018, a number of significant steps occurred in the CCAA proceedings of Sears Canada. In particular, on December 3, 2018, Justice Hainey heard a motion to permit litigation to be brought against the Former Directors and other parties. As soon as the Former Directors became aware of this motion, an update was provided to the 2015-2016 Insurers. Further updates were provided both prior to and after the motion was heard.

26. Justice Hainey permitted the proposed litigation to proceed, and three of the Actions were commenced around December 19, 2018. At that time, the Former Directors again updated the 2015-2016 Insurers, including QBE. Since that time, the Former Directors (through Covington) have provided updates to QBE and the other 2015-2016 Insurers about motions, case conferences, timetables, and all other material steps in the Actions.

27. By the spring of 2019, in light of payments already incurred in respect of unrelated claims under the 2015 XL Policy, it became apparent that the 2015 XL Policy would become exhausted prior to the completion of the trial of the Actions. Accordingly, Covington asked QBE on May 7, 2019 to confirm its commitment to provide coverage under the QBE Policy, including continuous reimbursement of the Former Directors' defence costs, immediately upon exhaustion of the coverage available under the 2015 XL Policy.

28. As set out above, QBE and the other insurers for the 2015-2016 policy year were aware by September 2018 that the primary insurer had acknowledged that this policy year applied and by November 2018 that XL had formally confirmed payment of defence costs. Neither QBE nor any other insurer raised any issue about coverage under the 2015-2016 policy year then or at any time prior to May 16, 2019.

The QBE Coverage Position

29. By letter dated May 16, 2019 (the "**QBE Coverage Letter**"), a copy of which is attached hereto as **Exhibit "E"**, QBE denied that there was coverage under the QBE Policy. Specifically, QBE asserted that:

(a) a letter from Sotos LLP dated December 3, 2013 (the "**2013 Sotos Letter**"), a copy of which is attached hereto as **Exhibit "F"** was a "Claim" under the relevant policy because it constituted a "written demand for non-monetary relief"; and

(b) the 129 Action and the 2013 Sotos Letter were "Interrelated Claims".

30. As a result, QBE took the position that insurers in the 2013-2014 policy period were responsible for responding to the Former Directors' claims for coverage.

31. QBE is not an insurer that provided D&O coverage to SHC in the 2013-2014 policy period. As such, the coverage decision as expressed in the QBE Coverage Letter, if accepted by the Court, would result in QBE not being liable to pay any defence costs or indemnify the Former Directors for any liability that they may be found to have in the Actions.

Request for Drop-Down Coverage

32. A number of the policies provided by the D&O insurers in 2015-2016 contain "drop-down coverage". This means that if there is no insurance available in an underlying layer or the insurer in that layer refuses to provide coverage, the coverage in the policy in the next higher layer will "drop down" and take the place of the layer where no coverage was provided.

33. The QBE Policy, as the first excess policy, was intended to provide US$15 million of coverage excess of the US$15 million provided by the 2015 XL Policy. The second excess policy

issued to SHC in 2015-2018 is from Lloyd's and provides coverage of US$15 million in excess of US$30 million (the "**Lloyd's Policy**"). The Lloyd's Policy contains a term in one of its endorsements that provides drop-down coverage. In light of this drop-down provision, Covington (on behalf of the Former Directors) has asked Lloyd's to honour this term of the Lloyd's Policy and to immediately provide drop-down coverage immediately upon exhaustion of the 2015 XL Policy. Covington made such request to Lloyd's counsel by letter dated June 17, 2019.

34. Lloyd's has not provided drop-down coverage of defence costs, nor responded to this request.

Berkshire Coverage Denial

35. On June 17, 2019, Covington received a letter from counsel to Berkshire Hathaway Specialty Insurance Company ("**Berkshire Hathaway**") denying coverage on the same grounds as QBE. Berkshire Hathaway had issued a fifth-layer excess policy that provides coverage of US$15 million excess of US$75 million for the policy period May 15, 2015 to May 15, 2016.

Notice to 2013 SHC Insurers

36. On June 21, 2019, Covington, on behalf of the Former Directors, provided SHC's insurers in the 2013-2014 policy period with notice that QBE had denied coverage under the 2015-2016 policy period and that, should it be determined by a court that the noticed claims arise from Interrelated Wrongful Acts (as defined in the 2015 XL Policy) alleged in a Claim first made in the 2013-2014 policy period, the Directors would demand coverage under the 2013-2014 policies. In particular, the Former Directors advised XL that it would be obligated to provide coverage under the 2013 XL Policy, and that all payments made pursuant to the 2015 XL Policy must be applied to exhaustion of the limits of the 2013 XL Policies.

37. A similar notice was provided by letter dated July 10, 2019 to counsel to XL in respect of coverage under the Sears Canada 2013 XL Policy.

Coverage Application

38. The Former Directors took prompt steps to challenge QBE's denial of coverage. In early June 2019, the Former Directors took steps to engage James Doris of Tyr LLP to act as their Canadian coverage counsel to bring an urgent application on the Commercial List for a declaration that QBE was required to provide coverage and to fund defence costs (the "**Coverage Application**"). Mr. Doris proceeded to seek an expedited hearing for the Coverage Application, given the timing of QBE's denial of coverage and the likelihood that coverage under the XL primary layer would be exhausted prior to trial.

39. As the insurance coverage dispute was closely related to the Sears litigation being case managed by Justice McEwen, on July 5, 2019, Mr. Doris attended in Chambers (with John Birch of CBB) in order to seek permission to have the Notice of Application issued by the Commercial Court and to set a return date for the application. I am advised by Mr. Birch and believe that during this attendance Mr. Doris informed Justice McEwen about the general nature of the proposed coverage application. Justice McEwen scheduled the hearing of the Coverage Application on August 27, 2019.

40. Accordingly, as of July 5, 2019, I believed that the Coverage Application would be heard on all issues on August 27, 2019 or shortly thereafter. I also believed that the Former Directors would have clarity as to whether QBE (under the 2015 QBE Policy) or XL (under the 2013 XL Policies) would be required to provide funding of defence costs once coverage under the 2015 XL Policy was exhausted.

41. On July 11, 2019, Mr. Doris sent a letter to Paul Stein of Gowling WLG (counsel for XL) and Tammy Yuen (counsel for QBE) advising that because of QBE's coverage position, the Former Directors would be looking to XL under the Sears Canada 2013 policy for coverage in the event QBE's position was upheld.

42. The Notice of Application was issued on July 11, 2019. I swore my affidavit in support of the Coverage Application on July 15, 2019. On July 18, 2019, Mr. Doris provided a copy of the Notice of Application and my affidavit in support of the Coverage Application to counsel for QBE and XL by email. The Application Record was formally served on July 18 and 19 at the insurers' offices in Toronto and New York.

Litigation Timetable in the Actions

43. I am informed by Wendy Berman, and believe, that she advised Justice McEwen and counsel for the various parties of the insurance coverage issues in case conferences held on May 27, 2019, June 18, 2019 and July 12, 2019.

44. I am informed by Wendy Berman, and believe, that a timetable for the Actions was approved by Justice McEwen at the case conference held on July 12, 2019. This timetable had been negotiated among counsel for the parties to the Actions in the weeks leading up to that date. At the time that this timetable order was granted, I had no knowledge that coverage under the 2015 XL Policy was about to be exhausted.

Exhaustion of XL Insurance Coverage

45. During the time that the case timetable was being negotiated, the Former Directors were not aware that coverage under the 2015 XL policy was exhausted or about to be exhausted.

46. The Former Directors first learned that coverage under the 2105 XL policy was exhausted shortly after July 15, 2019. In particular, the Former Directors learned that XL advised CBB by email on July 15, 2019, after 6:00 PM, that XL would only partially pay certain outstanding legal fees of CBB, at which point the XL Policy for 2015-2016 would be exhausted. This notification arrived after I had sworn my affidavit in support of the Coverage Application.

47. As a result, it became immediately apparent that outstanding legal fees would not be fully paid by XL and that, until the coverage issue with QBE was resolved or another insurer provided drop-down coverage, there would be no insurer funding of defence costs for any period thereafter.

48. This notice from XL that coverage had been exhausted was only provided after the case timetable had already been put into place.

Subsequent Developments

49. As a result, Mr. Doris continued to seek an expedited hearing of Coverage Application and to attempt to negotiate an interim funding arrangement for defence costs with counsel for QBE and XL. I am advised by Mr. Doris, and believe, the following regarding the events that occurred in the Coverage Application after it was served:

(a) On July 25, 2019,

(i) Jamieson Halfnight of Lerners LLP contacted Mr. Doris to advise that he had been retained by QBE;

(ii) Mr. Halfnight advised that jurisdiction was likely to be an issue for QBE and QBE did not think that it would be able to provide responding materials in time to have an August 27 hearing take place; and

(iii) Mr. Halfnight advised that he would shortly be departing for holidays and would be unable to deal with the Coverage Application during the time he was away.

XL also advised that it was considering whether to challenge the jurisdiction of the Ontario court, but had not made a final decision. Mr. Doris continued to press Mr. Stein and Mr. Halfnight to have the Coverage Application heard quickly.

50. By August 8, 2019, it had become clear that at least QBE (and likely XL, as well) would challenge the jurisdiction of the Ontario court. Since, by this point, neither QBE nor XL had delivered responding materials in the Coverage Application or even any motion seeking a stay based on lack of jurisdiction, it was apparent that some or all of the Coverage Application was likely to be delayed. As such, Ms. Berman sent a letter to counsel for the plaintiffs in the Actions on August 8, 2019 advising of the exhaustion of insurance coverage, the likely delays in the Coverage Application, and the effect that these events were likely to have on the case timetable. Her letter also enclosed an update that she proposed to send to Justice McEwen. Attached hereto and marked as **Exhibit "G"** is a copy of Ms. Berman's letter. Attached hereto and marked as **Exhibit "H"** is a copy of the letter that Ms. Berman subsequently sent to Justice McEwen on August 8, 2019.

52. Mr. Doris scheduled a telephone case conference with Justice McEwen on August 15, 2019 so that he and Messrs. Stein and Halfnight could update the court about the status of the Coverage Application. The plaintiffs in the Actions subsequently asked to join this case conference and Justice McEwen permitted them to do so.

53. I am advised by Mr. Birch, and believe, that during the telephone case conference on August 15, 2019, Mr. Doris updated Justice McEwen about the Coverage Application and Ms. Berman specifically informed Justice McEwen that, given the exhaustion of coverage and the

likely delays in having the Coverage Application heard, it would be necessary to adjust the case timetable. Justice McEwen directed that the time on August 27, 2019 previously allocated to the hearing of the Coverage Application would instead be used as a case conference to discuss the timetable for the Actions and the Coverage Application.

Attempts to Obtain Interim Funding of Defence Costs

54. I am advised by Mr. Doris, and believe, that he has raised with both Mr. Stein and Mr. Halfnight the possibility of whether some consensual arrangement could be reached that would provide funding for defence costs on an interim basis while the coverage dispute is determined.

55. No agreement has been reached to date for any interim funding of defence costs. As such, until the coverage issue is determined, the Former Directors will have no funding of defence costs.

Prejudice to the Former Directors

56. The Actions are currently scheduled to be tried together commencing in May 2020. The Actions seek hundreds of millions of dollars in damages against me personally and the other defendants. I have engaged counsel and defended the Actions based on an expectation, among other things, that defence costs incurred on my behalf would be covered by the relevant D&O Policies.

57. Given the complexity of the Actions, the voluminous documentary productions, the expedited procedural schedule and the serious financial and reputational consequences, it is critically important that I, along with the other Former Directors, be able to fully defend the Actions with the assistance of defence counsel, funded by the relevant D&O Policies.

58. Events that have occurred between July 15, 2019 and today will have a significant and serious negative impact on me. The exhaustion of XL's coverage and the delays in having the Coverage Application heard and determined mean that there will be a period of months during which the other Former Directors and I will have no funding to defend ourselves. This is particularly serious given that the current timetable contemplates numerous steps being taken in the Actions from August 23, 2019 into the fall of 2019. These steps include a potential production motion, advising whether a summary judgment motion will be brought, reviewing of productions and preparation for examinations for the November/December 2019 examinations for discovery, and attendance at the discoveries.

59. In addition, as noted above, QBE has made it clear that it intends to commence a parallel coverage proceeding in Illinois. This means that, in addition to having to pay out of my own pocket for Mr. Doris, I will also have to retain counsel in Illinois to respond to such proceeding and, likely, challenge the jurisdiction of the Illinois court. In that case, the Former Directors will be facing a total of six legal proceedings (the four Actions plus two coverage proceedings), the legal fees of which will not be paid by insurance.

60. As I have noted above, I agreed to sit on the board of Sears Canada based on the Indemnification Agreement and Sears Canada's commitment that D&O insurance coverage would be in place to fund defence costs and indemnify me. Since Sears Canada later became insolvent and is unable to pay its creditors in full, my only protection is from D&O insurance.

61. If the timetable for the Actions is not "paused" to allow the Coverage Application to be determined, I will suffer serious prejudice. The cost of coverage counsel in Canada and the U.S. and the cost of defence counsel will seriously deplete my assets and may become unaffordable. I am 72 years old and do not have the ability to earn enough money over the next few years to

recoup the damage caused by paying both coverage counsel and defence counsel in the Actions. In short, these legal costs will deplete my assets that I will need in my remaining years.

62. In short, the other Former Directors and I are the victim of very serious circumstances completely outside our control, namely the exhaustion of XL coverage, the refusal of QBE to provide coverage, the failure of Lloyd's to provide "drop-down" coverage, and the very tight timetable that was put in place before anyone knew that coverage had been exhausted, and will suffer prejudice if this timetable is not paused to allow for the resolution of the insurance coverage issues.

63. I am not aware of any reason why the trial of this action needs to be heard between May and July 2020. The Sears Canada CCAA proceedings have been ongoing for more than two years and the review conducted by the Litigation Investigator took more than eight months. Given these timelines, there is no countervailing prejudice to the plaintiffs from a brief delay in the litigation timetable related to the serious prejudice arising from the above insurance coverage issues.

64. Accordingly, to the extent that creditors have not received any interim distribution of proceeds from the estate of Sears Canada, this is not the result of anything that the Former Directors have done, but rather flows from the pace of the CCAA proceedings to date.

SWORN BEFORE ME at the City of Toronto this 26th day of August 2019.

Commissioner for Taking Affidavits

Donald Campbell Ross

FTI CONSULTING CANADA INC. J. DOUGLAS CUNNINGHAM, Q.C. MORNEAU SHEPELL LTD. 1291079 ONTARIO LIMITED Plaintiffs	-and-	ESL INVESTMENTS INC *et al.* Defendants	Court File No.: CV-18-00611219-00CL Court File No. CV-18-00611214-00CL Court File No. CV-18-00611217-00CL Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF DONALD CAMPBELL ROSS

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

TAB A

This is Exhibit "A" referred to in the Affidavit of Donald Campbell Ross sworn August 26, 2019

Commissioner for Taking Affidavits (or as may be)

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.

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, DONALD ROSS, and SEARS
HOLDINGS CORP.

Defendants

STATEMENT OF DEFENCE OF THE DEFENDANTS
EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY,
WILLIAM HARKER, JAMES MCBURNEY, and DONALD ROSS

1. The Defendants Ephraim J. Bird, Douglas Campbell, William Crowley, William Harker, James McBurney, and Donald Ross deny each and every allegation in the Amended Amended Statement of Claim, except where hereinafter expressly admitted, and deny that the Plaintiff Sears Canada Inc. is entitled to any of the relief sought in the Amended Amended Statement of Claim.

OVERVIEW

2. The Plaintiff seeks to recover the full amount of a dividend paid to all shareholders of Sears Canada Inc. (“Sears Canada” or the “Company”) almost six years ago (the “2013 Dividend”). This dividend was unanimously approved by the Company’s experienced board of

directors (the "Board"), the majority of which was independent, following comprehensive and careful consideration of the best interests of the Company. Sears Canada remained financially sound following the payment of the 2013 Dividend, and indeed for the duration of the tenure of the Defendants Douglas Campbell, William Crowley, William Harker, James McBurney, Donald Ross, and Ephraim J. Bird (the "Former Directors").

3. In 2011, in a challenging retail and economic environment, Sears Canada began a three-year strategic plan to transform the Company into a strong mid-market retailer with a renewed focus on suburban and smaller/rural centres (the "Transformation Plan"). As part of that strategic evolution, management recommended, and the Board approved, the divestiture of certain non-core real estate assets. These divestitures were expected to result in improvements to long-term financial and operational performance.

4. As a result of these divestitures, as well as the financial and operational improvements consequent to the implementation of the strategic plan, Sears Canada had significant cash on hand—expected to be more than $1 billion at the end of fiscal 2013.

5. Consistent with corporate governance best practices, the Board's decision regarding the use of the significant excess cash involved careful consideration of the financial and operational position of Sears Canada in light of its strategic plan and capital requirements, market conditions, and the fact that the Company had virtually no debt. Among other things, the Board assessed the needs of the business based on the Transformation Plan and management's priorities and operating plans, including strategies aimed at long-term growth. Management did not request any funding in excess of what would be available following payment of the 2013 Dividend to pursue the Transformation Plan or its other priorities, and more than sufficient cash remained on hand.

6. The 2013 Dividend was paid *pro rata* to Sears Canada's shareholders, all of whom were treated equally and all of whose interests were aligned. After the 2013 Dividend was paid, Sears

Canada's largest shareholders continued to have the largest investments—and strongest interests—in the ongoing operational success of the Company. Sears Canada was not insolvent or near insolvent when the 2013 Dividend was declared or paid, and it was not rendered insolvent by that payment. On the contrary, following payment of the 2013 Dividend, approximately $513.8 million in cash remained on Sears Canada's balance sheet, with virtually no debt, and its operations and plans for implementing management's strategic objectives remained fully funded.

7. Indeed, between 2011 and 2015, Sears Canada had no significant debt, maintained a significant cash position ($398 million in 2011 and $315 million in 2015) and, with availability under its credit facility, had significant total liquidity ranging from $434 million to $887 million in this period. Sears Canada was financially sound when the Board approved the 2013 Dividend and remained so during the Former Directors' respective terms on the Board.

8. The Former Directors complied with their duties and acted in the best interest of Sears Canada in approving the 2013 Dividend. The claim that the Former Directors should now pay $509 million—the amount of the 2013 Dividend—or any other amount to benefit the current creditors of Sears Canada, many of which were not even creditors when the 2013 Dividend was declared, is factually baseless and without legal merit. This action should be dismissed.

THE PARTIES

The Former Directors

9. The Defendant, Ephraim J. Bird, was a director of Sears Canada from May 2006 until November 18, 2013 and was the lead director of Sears Canada from May 2007 to March 2013. Bird resigned from the Board prior to the approval of the 2013 Dividend (for reasons related to overall Board composition). Bird was also the executive vice-president and chief financial officer of Sears Canada from March 2013 to June 2016. Bird was at all material times a highly

experienced director and officer with significant expertise in the management of retail organizations, investment fund strategy and management, and finance.

10. From 1991 to 2002, Bird was the chief financial officer of ESL Investments Inc. Bird is currently senior vice president and chief financial officer of Sears Hometown and Outlet Stores, Inc. Bird has a Master of Business Administration degree from the Stanford University Graduate School of Business, and he is licensed as a certified public accountant.

11. The Defendant, Douglas Campbell, was a director of Sears Canada from September 2013 to October 2014. In 2011, Campbell joined Sears Canada as an executive vice-president. In 2012, Campbell was promoted to the position of chief operating officer. In September 2013, Campbell succeeded Calvin McDonald as president and chief executive officer of Sears Canada, a position that he held until he resigned in the fall of 2014 for family reasons. Campbell was at all material times a highly experienced director and officer with significant expertise in the management of retail organizations and turnaround strategy.

12. Prior to joining Sears Canada, Campbell was a principal at Boston Consulting Group, where he focused on turnaround matters. Campbell is currently a partner with Harvest Partners, LP, a private equity firm focused on leveraged buyout and growth capital investments in mid-market companies. He has a Master of Business Administration degree in finance from The Wharton School at the University of Pennsylvania. Campbell has never held any position with the Defendant Sears Holdings Corporation (“Sears Holdings”) or ESL Investments Inc.

13. The Defendant, William Crowley, was a director of Sears Canada from March 2005 to April 2015, and chair of the Board from December 2006 to April 2015. Crowley was at all material times a highly experienced executive and corporate director with extensive experience in the management of retail organizations, investment fund strategy and management, and finance.

14. Prior to, and concurrent with part of, his tenure on the Board, Crowley held management roles with Sears Holdings, as executive vice-president, chief financial officer, and chief administrative officer at various times from March 2005 to January 2011, and with ESL Investments Inc., as president and chief operating officer from January 1999 to May 2012. Crowley previously worked as a financial analyst with Merrill Lynch and as a managing director of Goldman Sachs and co-founded an investment fund in 2013. Crowley has an undergraduate degree and a law degree from Yale University and a master's degree in philosophy, politics, and economics from the University of Oxford.

15. The Defendant, William Harker, was a director of Sears Canada from November 2008 to April 2015. Harker was at all material times a highly experienced corporate lawyer, corporate director, and senior manager with significant experience in the retail sector and in investment fund strategy and management.

16. Prior to, and concurrent with part of, his tenure on the Board, Harker held management roles with Sears Holdings, including as chief counsel from September 2005, then as general counsel from April 2006 to May 2010, and then as an officer until August 2012, and with ESL Investments Inc. as general counsel from February 2011 to August 2012. Harker also co-founded an investment fund in 2013. He previously practised as a corporate lawyer with the law firm of Wachtell Lipton Rosen & Katz LLP in New York City and has a law degree from the University of Pennsylvania.

17. The Defendant, James McBurney, was a director of Sears Canada from April 2010 to April 2015. McBurney was at all material times a highly experienced executive and corporate director with extensive experience in mergers and acquisitions and corporate strategy.

18. Prior to joining the Board, McBurney was the chief executive officer of HCF International Advisers in London, where he focused on strategic advisory and mergers and acquisitions

matters. Prior to that position, he was employed by Goldman Sachs in New York, where he focused on mergers and acquisitions. McBurney is currently an executive in the technology industry. McBurney has a Master of Business Administration degree from the Harvard Business School. McBurney has never held any position with Sears Holdings or ESL Investments Inc.

19. The Defendant, Donald Ross, was a director of Sears Canada from May 2012 to April 2014. Ross was at all material times a highly experienced lawyer with extensive experience in corporate law and corporate governance. From 1988 to August 2013, Ross was a partner at Osler, Hoskin & Harcourt LLP, where he focused on domestic and cross-border mergers and acquisitions and corporate finance and advised senior management and boards of directors on corporate governance matters. Since September 2013, he has held a senior counsel position with the New York office of Covington & Burling LLP.

20. Ross has been recognized for his work by numerous legal publications and organizations including Chambers Global, the Best Lawyers in Canada, the Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada, and the IFLR 1000. He has an undergraduate degree from the University of Toronto, a law degree from Osgoode Hall Law School, and a master's degree from the London School of Economics. He is a member of Ontario and New York bars. Ross has never held any position at Sears Holdings or ESL Investments Inc.

Rosati and Khanna

21. To the best of the Former Directors' knowledge, the Defendant, Deborah E. Rosati, was a director of Sears Canada from April 2007 to August 2018 and the Defendant, R. Raja Khanna, was a director of Sears Canada from October 2007 to August 2018.

Sears Holdings Corporation

22. To the best of the Former Directors' knowledge, the Defendant, Sears Holdings, is a corporation incorporated under the laws of Delaware. On October 15, 2018, Sears Holdings filed for protection from its creditors pursuant to Chapter 11 of the *United States Bankruptcy Code*.

The ESL Defendants

23. To the best of the Former Directors' knowledge, the Defendant, ESL Investments Inc., is an investment fund incorporated under the laws of Delaware. The Defendants, ESL Partners LP, SPE I Partners, LP, SPE Master I LP, and ESL Institutional Partners, LP, were at all material times controlled directly or indirectly by ESL Investments Inc. (these limited partnerships, together with ESL Investments Inc., "ESL").

24. To the best of the Former Directors' knowledge, the Defendant, Edward Lampert, is an individual residing in Florida who at all material times was the principal of ESL. Lampert was also, at all material times, the chair and chief executive officer of ESL Investments Inc., the chair of Sears Holdings, and, beginning in February 2013, the chief executive officer of Sears Holdings.

25. To the best of the Former Directors' knowledge, at all material times, Sears Holdings held a 51% interest in Sears Canada, ESL held a 17.4% interest in Sears Canada, and Lampert held a 10.2% interest in Sears Canada.

The Plaintiff

26. Sears Canada is a corporation incorporated under the laws of Canada, with its headquarters in Toronto, Ontario. On June 22, 2017, Sears Canada obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

27. Prior to the CCAA proceedings, Sears Canada was a multi-format retailer focused on merchandising and sale of goods and services through its network of approximately 111 full-line

department stores and 295 speciality stores, including Sears Home stores and Sears Hometown dealer stores, as well as its direct (catalogue/internet) channel.

BACKGROUND

28. The global economic recession in 2008 and 2009 negatively impacted Canadian retailers, including Sears Canada. Its business, like many retailers, was affected by various factors such as low consumer confidence (the lowest in almost 30 years), high unemployment, rising consumer debt, a strong Canadian dollar, and rising expenses, among others.

29. These factors, combined with the increasingly competitive retail marketplace, were major contributors to changes in Sears Canada's operational performance in 2010, including a 4% same store sales decline and a 41% decline in EBITDA as compared to 2009.

30. Sears Canada maintained a strong financial position despite economic and retail market conditions and operational challenges. In particular, in 2010, it reduced its debt exposure through the repayment of $300 million of medium-term notes and arranged access to an $800 million credit facility on which it could draw, if necessary, to fund working capital needs, capital expenditures, acquisitions, and for other general corporate purposes. Additionally, in 2010, Sears Canada declared total dividends of $753.4 million, or $7 per share, and repurchased approximately 2.2 million shares for approximately $43 million pursuant to a normal course issuer bid.

31. Nevertheless, given the changes in the retail landscape, and since Sears Canada's traditional customer base—older Canadians living in suburban and smaller/rural centres—was eroding, the Company initiated a process to redefine itself. This process was undertaken in the context of volatility in the retail industry, at a time when Sears Canada faced fierce competition from entry into the Canadian market by American retailers, the liquidation of other Canadian retailers, the advancement of consumer technologies, increased e-commerce and cross-border

shopping, and shifting spending patterns in the baby boomer generation, a key target market for Sears Canada.

THE TRANSFORMATION PLAN

32. Beginning in 2011, under the guidance of its new chief executive officer, Calvin McDonald, Sears Canada undertook a full diagnostic review of all aspects of its business. The purpose of this review, which included an assessment of, among other things, merchandising and marketing, operations and logistics, direct sales (website and catalogue), and the nature and extent of the Company's "retail footprint", was (i) to focus the business on the Company's strengths and (ii) to determine how best to respond to changing market conditions.

33. This review culminated in a three-year strategic plan designed to transform the Company over time by renewing and improving its operational performance and re-focusing its retail business on its traditional core strengths. This Transformation Plan acknowledged that Sears Canada had strong performance in suburban and smaller centre/rural markets, had "lost its focus" by pursuing urban markets, and was "stuck" without a relevant value proposition for these three distinct markets: rural, suburban, and urban.

34. The Transformation Plan, which was carefully considered and approved by the Board, was a "compass" for the business transformation, with annual financial and operational plans functioning as "roadmaps" for the implementation of that transformation. The Transformation Plan and annual financial and operational plans included initiatives to improve Sears Canada's operational performance, enhance its core retail business, and unlock value, including through operational changes and capital investment to refresh a number of Sears Canada's stores and thereby improve the performance of the refreshed stores. Sears Holdings, Lampert, and ESL did not take a direct role in developing Sears Canada's business strategy.

35. The Transformation Plan acknowledged the need for Sears Canada to focus on getting the basics of retail right before it could realize any benefit from investing significantly in its retail locations and provided for a disciplined approach to capital investment.

36. In connection with the store refreshes, management recommended a phased approach, with an initial limited phase of refreshes, and a demonstrated return on investment prior to any further or Company-wide implementation of store refreshes. The Board authorized the phased approach to capital investment to ensure adequate return for the benefit of the Company.

37. Sears Canada made significant investments in its business as part of the implementation of the Transformation Plan and operating plans in 2012 and 2013. Among other things, it invested

(a) a total of $165 million in capital expenditures;

(b) approximately $40 million completing the refresh or reset of 58 full-line stores, with emphasis on merchandise presentation and standards; and

(c) $125 million in various other capital projects, including $8 million in its website, which drove e-commerce growth that exceeded the decline in catalogue.

38. As part of the Transformation Plan, management initiated a thorough assessment of the Company's real estate assets to identify unproductive stores and excess space that, in the context of the strategic review, had higher "real estate value" than "trading value", measured by a multiple of "four-wall" EBITDA.[1] Management called the initiative "Project Matrix".

39. Project Matrix was not initiated, as alleged, because Sears Holdings, ESL and Lampert "had an immediate need for cash" in early 2013. Nor was it devised, as alleged, by Sears

[1] EBITDA refers to earnings before interest, tax, depreciation and amortization. It is a key measure of a company's operating performance and, in particular, indicates the cash operating profit of a business. It is used by management and investors to assess a company's operational performance by eliminating the effects of financing decisions, accounting decisions, or tax environments.

Holdings, ESL or Lampert as a “plan to extract cash” from Sears Canada. The Former Directors were not aware of any cash liquidity issues or cash constraints for Sears Holdings, ESL or Lampert while they were directors of Sears Canada.

40. Project Matrix was initiated by Sears Canada’s management in early 2012. It was led by a steering committee composed of senior management from the real estate, legal, and finance departments of Sears Canada, not by the Board. The assessment undertaken in connection with Project Matrix confirmed that the Company was not optimally positioned with its “real estate footprint”, that certain locations (particularly in large urban centres) were more valuable to the Company as real estate assets than as operating stores, and that the divestiture of those assets could “right-size” and re-focus the business by reducing major urban locations.

41. In particular, given economic conditions and the increasingly competitive retail landscape in Canada, management recognized that the sale of store leases for stores that did not generate meaningful operational returns would allow the Company to focus on its core retail business. At the same time, aggressive entry into the Canadian market by American retailers presented a unique and time-limited opportunity for Sears Canada by increasing demand for space that did not fit within the Company’s business model.

42. The initiative became a key aspect of the ongoing implementation of the Transformation Plan to refocus operations on Sears Canada’s core customer base in suburban, mid-market, and smaller/rural locations, and generate long-term value. Management provided detailed reports to the Board on the results of Project Matrix (including an assessment of each store, with rankings according to their respective real estate values and trading values, measured by a detailed “four-wall” EBITDA assessment) and the proposal to divest unproductive real estate assets to transition the Company to a mid-market retailer without major urban locations.

43. Management identified the top ten stores for which the real estate value far exceeded the trading value. Management presented various scenarios and proposed that Sears Canada pursue the sale of six to eight of these full-line stores, located in urban markets, and right-size an additional seven or eight full-line stores by subletting excess space in the near term.

44. The Board approved annual financial and operational plans presented by management relating to implementation of the Transformation Plan, which were designed to address changes in retail market conditions and the impact of the various initiatives on the Company's business. In addition to quarterly meetings, the Board met with management every month to review financial and operational performance and each fall, the Board attended a two-day strategic session prior to the review and approval of the annual financial and operational plan.

REAL ESTATE DIVESTITURES

45. Project Matrix culminated in Sears Canada entering into four transactions in 2013 for the sale or redevelopment of certain store locations. Management led the negotiations for each transaction with assistance from external advisors and input from various Board members. The Board was specifically aware of the assistance provided by the Former Directors and Jeffrey Stollenwerck, an executive with Sears Holdings, who had relevant expertise and relationships with Sears Canada's and other retail landlords. Lampert did not direct the negotiating strategy in connection with these transactions.

46. Management recommended each transaction to the Board following comprehensive review and consideration and provided detailed presentations to the Board with its recommendations, which included an assessment of the transaction, an evaluation of store performance versus real estate value, accounting implications of a sale, and the impact of the proposed sale on operational and financial performance, EBITDA, and the balance sheet. Each of

the four transactions was carefully reviewed and unanimously approved by the Board as being in the best interests of Sears Canada.[2]

The Oxford Transaction

47. Sears Canada entered into a transaction with Oxford Properties Group ("Oxford") for the sale of leases for Yorkdale and Square One for total consideration of $191 million and a $1 million payment by Oxford in exchange for an option to purchase the Scarborough Town Centre lease for $53 million.

48. The transaction was not initiated by the Company. Rather, it was initiated by a proposal from Oxford and negotiations were led by Sears Canada's management with input as necessary from external advisors and various Board members.

49. Management had ranked the three stores in the Oxford transaction in the top ten stores with real estate value exceeding trading value, and the divestiture of these assets was consistent with the Company's plan to right-size and re-focus its business. The consideration of $191 million represented more than 21 times the four-wall trading EBITDA for Yorkdale and the Square One locations, 10.6 times the four-wall trading EBITDA for Scarborough Town Centre, and exceeded management's estimate of real estate value by approximately $55 million.

The Concord Transaction

50. Sears Canada entered into a transaction with Concord Kingsway Project Limited Partnership ("Concord") for the sale of a 50% beneficial interest in its property in Burnaby, British Columbia—except for the new Sears Canada store site—and the creation of a co-ownership joint venture for the redevelopment of a mixed-use residential office and retail shopping centre. The total consideration proposed was approximately $140 million.

[2] In light of a potential conflict related to outside business activities not related to Sears Canada, Harker and Crowley recused themselves from the review and approval of the Concord transaction, described below.

51. Management recommended partnering with Concord, in preference to two other candidates that had been considered, on the basis that Concord proposed the most favourable structure, was one of Canada's largest mixed-use developers, and offered the highest net present value.

The Cadillac Fairview Transaction

52. Sears Canada entered into a transaction with Cadillac Fairview Corporation Limited ("Cadillac Fairview") for the sale of leases for five stores: the Toronto Eaton Centre, Sherway Gardens, Markville Shopping Centre, Masonville Place, and Richmond Centre. The total consideration proposed was $400 million.

53. The transaction was not initiated by the Company. Rather, it was initiated by a proposal from Cadillac Fairview and negotiations were led by Sears Canada's management with input as necessary from external advisors and various Board members.

54. Management had determined that the five stores that were the subject of the Cadillac Fairview transaction were among the seventeen stores whose real estate value most significantly exceeded trading value, and three of the stores were in the top ten. The divestiture of these assets was consistent with the Company's plan to right-size and re-focus its business. The consideration of $400 million represented more than 26.1 times the four-wall trading EBITDA and exceeded management's estimate of real estate value by approximately $158 million.

The Montez Transaction

55. Sears Canada entered into a transaction with Montez Income Properties ("Montez") for the sale of Sears Canada's 50% joint venture interest with Westcliff Group of Companies in eight shopping centres in Quebec for consideration of approximately $315 million.

56. Management advised the Board that this amount represented fair market value for these non-core real estate assets. The transaction allowed the Company to refocus is business by exiting the joint venture arrangement while continuing to operate full-line stores in the eight shopping centres, with the leases being amended to show Sears Canada as a tenant and not a landlord.

57. When announcing the transaction with Montez, the Company explained that “unlocking the value of assets is a lever we use as a way to help create total value. The joint venture assets we are selling to Montez impact neither our store operations nor our ability to serve customers. As such, our primary focus in creating long-term value remains on the basics of the business and continuing to become more relevant with Canadians coast to coast.”

The Board Rejected Transactions Inconsistent with the Transformation Plan

58. The Board did not approve transactions proposed by management that were inconsistent with the Transformation Plan. In particular, in late 2013 management proposed a transaction with Ivanhoe Cambridge to sell five store leases and its 15% joint venture interest in a shopping centre in Quebec. As with all potential real estate divestitures presented by management, the Board conducted a thorough review and consideration of this transaction to determine whether it was consistent with Sears Canada’s strategy and long-term interests.

59. After careful consideration, the Board decided that the proposed transaction was not consistent with the objectives of the Transformation Plan, including the right-sizing of the retail footprint since most of these locations were too valuable as operating stores to be divested. Accordingly, the Board did not authorize management to pursue the proposed transaction.

All Transactions Were Driven by the Transformation Plan

60. These transactions did not represent a sale of the Company’s “crown jewels”, as alleged. In fact, the opposite is true. All of these transactions related to store locations whose value as real

estate assets far exceeded their trading value as operating stores. The sale of these assets was consistent with the Transformation Plan—the strategy approved by the Board to right-size the Company's full-line store network and refocus Sears Canada's retail operations on its core customer base in suburban and smaller/rural locations while growing that business.

61. The Former Directors deny that any of these transactions was entered into for an improper purpose and deny that the divestment of these real estate assets in 2013 had any negative short-term or long-term impact on the Company, or in the alternative, could be foreseen to have a long-term negative impact.

62. In fact, these transactions were expected to generate positive results. In September 2013, management presented the 2014 financial and operating plan, with a focus on improving earnings through further cost savings, right-sizing, and targeted capital expenditures. The plan outlined various financial and operational improvements from the implementation of the Transformation Plan in the first half of 2013, including improvements in EBITDA of approximately $19 million (on a comparable basis) and in gross margin rate of approximately 66 basis points year over year.

63. The plan outlined a path, in light of retail market conditions, to achieve EBITDA ranging from 3.9% to 5% of total revenue with more moderate sales growth and projected cost savings initiatives totalling approximately $200 million in various areas of the business, including logistics and cost of goods sold over the next three years. It also incorporated the impact of the divestiture of full-line locations as part of the Company's continued right-sizing. Through the continued implementation of these initiatives, Sears Canada's EBITDA was projected to be $196 million by 2016 rather than the projected negative $105 million without such initiatives.

64. In late September 2013, McDonald resigned as chief executive officer of Sears Canada to take a senior leadership position with a global retailer. He was replaced by Douglas Campbell, the Company's chief operating officer, who had particular expertise in retail turnaround and other

turnaround projects, including in the manufacturing, consumer packaged goods, chemicals, and pharmaceuticals industries. Sears Canada continued to implement the Transformation Plan and the Project Matrix strategies developed under McDonald's leadership, with necessary adjustments as recommended by Campbell—particularly those focused on cost savings.

APPROVAL OF THE 2013 DIVIDEND

65. The four real estate transactions resulted in total cash consideration of $906 million, and management anticipated that Sears Canada would have cash on hand of approximately $1 billion at the end of fiscal year 2013.

66. In early November 2013, the Board decided that, at its November 18 and 19, 2013 meeting, it would evaluate possible uses of the proceeds while taking into account the financial and operational position of the Company and the future needs of the business, as Sears Canada implemented its strategic plan. Bird, Crowley, Harker and the other Former Directors never treated approval of the 2013 Dividend as a "foregone conclusion".

67. The Board's process leading up to the approval of the 2013 Dividend was robust and consistent with good corporate governance practices. The approval of the 2013 Dividend by the Board was an exercise of informed business judgment.

The Board Was Aware of the Requirements for Declaring Extraordinary Dividends

68. Approximately one year earlier, on December 12, 2012, in the midst of implementing the Transformation Plan, Sears Canada declared an extraordinary dividend of $102 million (the "2012 Dividend"). Prior to the declaration of the 2012 Dividend, Sears Canada expected to have on hand cash and cash equivalents of approximately $400 million. At the end of 2012, after paying the 2012 Dividend, Sears Canada had approximately $240 million in cash and cash equivalents.

69. Prior to approving the 2012 Dividend, the Board received a presentation which included both (i) an analysis of the impact of a dividend on the Company's financial position, including its liquidity position, cash, EBITDA, total debt, and the anticipated cash requirements for operations and (ii) a sensitivity analysis. This presentation reviewed the Board's governance considerations, and summarized the statutory solvency and process requirements, under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA").

70. The Board also received confirmation from the chief financial officer, following consultation with the Company's auditor, Deloitte, that statutory solvency requirements were met, and was provided with an officer's certificate certifying that, among other things, there were no reasonable grounds for believing that Sears Canada was, or would be after the payment of the 2012 Dividend, unable to pay its liabilities as they became due.

71. In light of the Board's ongoing dialogue and consideration of the Company's business and operations throughout 2012, including at numerous Board meetings and otherwise, much of the information contained within this presentation was already known to the Board when the presentation was provided.

72. The process undertaken by management and the Board leading up to the declaration of the 2012 Dividend was robust and consistent with corporate best practices. The decision to declare the 2012 Dividend was an exercise of informed business judgment by the Board acting in the best interests of Sears Canada.

The Board Was Fully Informed and Engaged

73. The Board was provided with the information necessary for the consideration of a dividend in 2013, and the decision by the Board to approve the 2013 Dividend was informed by the analyses, presentations, and discussions that occurred during the November 18, 2013 meetings and the informal and formal meetings of the Board and the audit committee of the Board (the

"Audit Committee"), which took place leading up to those meetings, and in the course of extensive dialogue among members of the Board.

74. In particular, in advance of the declaration of the 2013 Dividend, the Audit Committee, composed entirely of independent directors, met on February 26, March 14, May 21, August 20, and November 18, 2013. Additionally, in advance of the declaration of the 2013 Dividend, the Board met on January 30, March 14, April 24, April 25, April 29, May 21, June 13, July 16, September 4, September 5, September 23, October 11, October 28, and November 18, 2013.

75. Aside from formal meetings, members of the Board were in frequent contact not only around the time of scheduled meetings but also on an as-needed basis, and at least once per month. The Board was also informed by the analyses and discussions that occurred at such meetings in advance of the Company declaring the 2013 Dividend and their experience and knowledge regarding practices and processes relating to a decision to declare a dividend.

76. In 2013, the Board received, among other things, the following:

(a) annual operating plans which included detailed cash flow analyses, operating cash requirements, and capital expenditures relating to the ongoing business and the implementation of the Transformation Plan;

(b) regular updates on the financial and operational position of the Company, the status of the implementation of the Transformation Plan—including capital needs required to drive long-term growth in a manner consistent with this strategy, cash flow analyses and cash requirements, debt, and the status of pension funding, including at quarterly Board meetings and on monthly financial update calls; and

(c) regular updates at quarterly, special-purpose, and informal Board meetings and by e-mail about the implementation of Project Matrix and the divestiture of real estate assets.

77. In light of the significant amount of information provided to the Board by management, in the summer of 2013 the Board was aware of the cash needs and operational requirements of the Company. In particular, from ongoing monthly and sometime weekly discussions with management, the Board was aware that all transformation and operating plan projects were adequately funded and that no additional capital could be usefully deployed to enhance these projects and drive long-term growth for the Company.

78. In September, October, and early November 2013, during multiple meetings of the Board, management provided analyses and other details relating to the business and operations of the Company, cash flows, and pending real estate transactions, all of which were discussed and considered by the Board. The financial performance updates that management provided to the Board about the implementation of the Transformation Plan and annual operating plan demonstrated that the Company's EBITDA was improving as compared to the prior year:

(a) regarding the September 2013 financial results, that EBITDA had improved by $2 million compared to September 2012;

(b) regarding the October 2013 financial results, that EBITDA had improved by $5.6 million compared to October 2012; and

(c) regarding the third quarter 2013 financial results, that EBITDA had improved $11.7 million compared to October 2012 on a year-to-date basis and by $19.6 million on a comparable year-to-date basis.

79. As part of the preparation for the Board meeting scheduled for November 18 and 19, 2013, management prepared *pro forma* balance sheet, income statement, and cash flow analyses for the remainder of 2013 and 2014, and analyzed the impact of potential dividend scenarios. Based on these analyses, management determined that Sears Canada's cash-on-hand substantially exceeded the cash needed to implement its strategic plan, and thus there was sufficient excess cash to permit a dividend of between $7 and $8 per share, assuming no debt.

80. In advance of that Board meeting, the Board received and reviewed voluminous materials. In particular, the materials provided to the Board in advance of the Audit Committee meeting, which the entire Board attended, included the following:

(a) the draft third quarter results, management discussion and analysis, and draft press release, as well as an analysis prepared by management relating to the Company's financial performance, factors relating to the retail sector, and accounting implications of divestiture of real estate assets;

(b) an analysis prepared by Deloitte relating to third quarter 2013 results; and

(c) an analysis of pending litigation.

81. In addition, the materials provided to the Board in advance of the Board meeting included the following:

(a) an analysis outlining management's immediate priorities, including

(i) building a long-term growth strategy by focusing on sustainable growth on a smaller asset base; and

(ii) generating cash from investing activities to create value and fund growth by selling assets deemed to be non-core;

(b) an analysis of asset valuation, which confirmed that there was a substantial core business remaining after the real estate divestitures;

(c) an analysis of operating efficiency, which included a plan to drive excess cost out of the business so that Sears Canada could achieve 70% of its $200 million savings target in 2014 and an update on a “90 Day Program” stating that top opportunities were being pursued that would yield $106 million in annual savings;

(d) an analysis of merchandising value, which included a category performance review, strategies to address gaps in operational performance, and strategies to re-build Sears Canada’s value proposition with the goal of clearly and consistently standing for something in the minds of Canadian consumers; and

(e) a financial analysis prepared by the chief financial officer together with the Company’s 2014 Financial Plan, which provided management’s view of the Company’s financial position and cash needs for 2014.

82. Sears Canada’s investment committee also received presentations prepared by Towers Watson and management relating to the registered pension plan (the “Plan”) in advance of the Board meeting, which were relayed to the Board at the meeting, and confirmed that

(a) the year-to-date return for the Plan was 8.3% and for the third quarter was 2.54%, both of which were above the benchmark, and that during the third quarter Plan assets had increased on a net basis by $10.2 million; and

(b) on a going-concern basis, the Plan was forecasted to achieve a surplus of $77 million and to improve its solvency by more than 50%.

Declaration of 2013 Dividend: Exercise of Business Judgment

83. On November 18 and 19, 2013, the Board met to review and consider a number of items, including the possible declaration of a dividend. This meeting was held in New York, consistent with the Board's practice to have periodic meetings in both Toronto and New York.

84. The Board did not decide to authorize the 2013 Dividend at a "short pre-dinner discussion on November 18, 2013", or without receiving any financial analyses or information from management, as alleged. In fact, on November 18, 2013 before the Board meeting, the Audit Committee met to consider a number of matters. All of the members of the Audit Committee were independent directors. Consistent with past practice, all of the Board members attended the Audit Committee meeting. The Company's auditor, Deloitte, also participated in the meeting and an *in-camera* session with the committee members.

85. The presentation provided by management at this meeting indicated that the Company's balance sheet and liquidity position remained strong, with significant cash on hand and no draws on the credit facility. The presentation also indicated that Sears Canada had approximately $1.66 billion in current assets, and provided information on real estate transactions completed, including the Oxford, Concord, Montez, and Cadillac Fairview transactions.

86. Additionally, Deloitte delivered a report on November 18, 2013 which noted that it had discussed a number of matters with management, including pending litigation, changes to pension discount rates and the required reserve, and the recent real estate transactions completed by the Company.

87. During the Board meeting, with the benefit of information that had been provided to them in advance and at the Audit Committee meeting, management and the Board discussed the real estate divestiture transactions, cash position, capital requirements, funding for turnaround projects, long-term growth, and possibility and amount of a potential dividend.

88. At this meeting, the Board also

(a) received and considered a detailed presentation on management's priorities and asset valuation, including strategies aimed at long-term growth for the Company—all of which were fully funded;

(b) received and considered a dividend sensitivity analysis and discussed and considered the timing and quantum of a dividend in light of the Company's operational and cash position, and the cash that would remain following payment, including in the event that

(i) the Montez transaction, which was expected to close in January 2014, did not close; or

(ii) projected revenues and earnings were not achieved;

(c) received and considered a detailed presentation from the chief financial officer regarding the financial and operational position of the Company, future cash requirements, cash flow and liquidity, and the impact of the payment of a dividend of $5 per share on the Company's financial and liquidity position in 2013 and 2014;

(d) received and considered a presentation from the chair of the Board's investment committee regarding the Plan; and

(e) received confirmation from management, following consultation with Deloitte, that the statutory solvency requirements were met and received a certificate of solvency from the chief financial officer prior to approving the 2013 Dividend.

89. All but two of the directors, Campbell and Ron Weissman, were members of the Board when Sears Canada had declared an extraordinary dividend less than one year earlier, after receiving legal advice about their duties in relation to declaring dividends. The Board, which was composed of highly skilled and experienced corporate directors with expertise in retail, finance, accounting, and law, had significant and specific experience relating to these duties. In addition, the Board had the input and advice of both the general counsel and the assistant general counsel, who attended the Audit Committee and Board meetings.

90. The two directors who were not members of the Board when it approved the 2012 Dividend were, like the other directors, satisfied that the 2013 Dividend was in the best interests of Sears Canada on the basis of the information provided to them in advance of and at the Audit Committee and Board meetings, their discussions with other members of the Board, and the information presented to the Board by management on November 18, 2013.

91. None of the Former Directors had a material relationship with Sears Holdings, ESL, or Lampert which could reasonably have been expected to interfere with their independent judgment in supporting the 2013 Dividend. At all material times, and in particular on November 18, 2013, the Former Directors were not conflicted and exercised their independent judgment with a view to the best interests of Sears Canada when they voted to approve the 2013 Dividend.[3] Any historic relationships between some of the Former Directors and Sears Holdings, ESL, or Lampert did not in any way affect their decisions as directors of Sears Canada.

[3] Harker and Crowley were not considered to be independent under National Instrument 52-110, which relates to independence for the purpose of audit committee membership only. They were not members of the Audit Committee.

92. Additionally, and in any event, the interests of all shareholders with respect to the Company's declaration of the 2013 Dividend were aligned, all shareholders were treated the same, and Sears Holdings, ESL, and Lampert had the strongest interest in (and investment in) the ongoing financial and operational success of Sears Canada.

93. Contrary to the allegations in the Amended Amended Statement of Claim, the 2013 Dividend was not approved by the Board with "undue haste", in an ill-considered manner, or in concert with Sears Holdings, Lampert or ESL. Nor was the timing or quantum of the 2013 Dividend driven or dictated by Sears Holdings, Lampert, or ESL, or their need for funds.

94. Indeed, none of the decisions regarding Project Matrix, the divestiture of real estate assets, any other aspect of the Company's financial and operational plans, or the 2013 Dividend was in any way directed by or related to the financial needs of Sears Holdings, ESL, or Lampert. There was no "plan to extract cash from Sears Canada" through the sale of real estate assets devised by Sears Holdings, ESL or Lampert, or at all. Even if there were such a plan, which is denied, the Former Directors were not generally or specifically aware of it, and they were certainly not participants in such a plan.

95. Rather, the process undertaken by management and the Board leading up to the declaration of the 2013 Dividend was robust and consistent with corporate best practices. Moreover, the decision was an exercise of informed business judgment by the Board acting in the best interests of Sears Canada.

96. On December 6, 2013, the 2013 Dividend was paid *pro rata* to Sears Canada's shareholders. Sears Canada was not insolvent or nearly insolvent when the 2013 Dividend was declared or paid and was not rendered insolvent by that payment. On the contrary, following that payment, approximately $513.8 million in cash still remained on Sears Canada's balance sheet, with virtually no debt, and its operations and plans for the future remained fully funded.

No Dividend in 2014: Exercise of Business Judgment

97. In March 2014, the Board considered the Company's cash position following the completion of the Montez transaction and the possibility of a further dividend. In particular, the Board reviewed two further dividend scenarios presented by management valued, respectively, at $1.50 and $2.50 per share.

98. At that time, the Board received a detailed presentation from management regarding the financial and operating results for the fourth quarter of 2013, the drivers for such results, and various initiatives being undertaken by management to improve performance.

99. Consistent with its approach to the consideration of the 2012 Dividend and the 2013 Dividend, the Board undertook a comprehensive review and consideration of the financial position and the potential impact of various dividend scenarios.

100. Ultimately, the Board decided not to declare a dividend because of Sears Canada's unexpected poor performance in the fourth quarter of 2013 and its resulting cash position, which was lower than expected. As with the decision to declare the 2013 Dividend, the decision not to declare a dividend in 2014 was an exercise of informed business judgment by the Board acting in the best interests of Sears Canada.

DEFENCES TO CLAIMS

No Breach of Duty

101. At all material times, and in particular, in approving the 2013 Dividend, the Former Directors acted honestly and in good faith with a view to the best interests of Sears Canada. They also exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances in approving the 2013 Dividend.

102. The Former Directors complied with their statutory fiduciary duties and their duty of care set out in paragraphs 122(1)(a) and (b) of the CBCA, as well as any common law duties they owed.

103. The Former Directors (and the Board as a whole) were entitled to determine that it was in the best interests of Sears Canada to distribute to shareholders, by declaring a dividend, some or all of the net proceeds of previous divestitures of unneeded real estate assets.

104. The Former Directors (and the Board as a whole) properly discharged their statutory duties in relation to the 2013 Dividend, including by ensuring that the solvency test set out section 42 of the CBCA was met. In particular, in addition to considering the solvency test, the Former Directors (and the Board as a whole)

(a) received and considered extensive information about the performance of Sears Canada and its progress in achieving the goals set out in Project Matrix;

(b) knew that as a result of the divestitures of real estate assets Sears Canada had cash on hand that exceeded its contemplated requirements and, as a result, that the business of Sears Canada would not be impaired by the payment of a dividend; and

(c) specifically obtained a solvency certificate from management confirming the solvency of Sears Canada both before and after the payment of the 2013 Dividend.

105. The Board's decision to approve the 2013 Dividend, based on the information that was available at that time, was an informed exercise of business judgment by the Board, including the Former Directors.

106. Bird was not a director of Sears Canada at the time the 2013 Dividend was approved and did not propose or approve the 2013 Dividend. Bird provided sufficient and adequate information to the Board before it considered and approved the 2013 Dividend.

No Oppression

107. The Former Directors did not act in a manner that was oppressive toward Sears Canada or its creditors, or at all. In any event, the Former Directors deny that there is any basis in fact or in law for Sears Canada to claim oppression based upon its own interests and expectations or on behalf of any of its creditors whatsoever.

108. The Former Directors did not owe any duties to existing or future creditors of Sears Canada in the circumstances of the 2013 Dividend, including because the solvency test set out in section 42 of the CBCA was met.

109. In any event, the Former Directors deny that the creditors of Sears Canada had any reasonable expectations that the Board would not declare a dividend in the circumstances. Sears Canada's creditors could not reasonably have expected the Company to hold onto hundreds of millions of dollars in 2013 to hedge against the risk that it might fail three-and-a-half years and be unable to pay creditors. Such expectations, which are denied, are not supported by any legal duty.

110. The Former Directors further deny that they disregarded any reasonable expectations of Sears Canada or its creditors or that they exercised their powers to propose, plan for, prepare, recommend, or authorize the 2013 Dividend in a manner that was unfairly prejudicial, or which disregarded, the interests of Sears Canada and its creditors, which unfairness, prejudice, and disregard is denied.

111. In addition, the Former Directors deny that there is any basis in fact or in law for Sears Canada to claim oppression on behalf of creditors who were not creditors at the time of the 2013 Dividend or who were repaid after the 2013 Dividend was paid. These creditors do not themselves have a claim under section 241(2) of the CBCA. In particular,

(a) creditors who became creditors after the 2013 Dividend have no claim since they were not creditors at the time of the allegedly oppressive conduct and therefore

(i) cannot have had a reasonable expectation in relation to a past event, namely the declaration of the 2013 Dividend;

(ii) extended credit on the basis of Sears Canada's then-existing financial state, which accounted for the 2013 Dividend; and

(iii) cannot have suffered a loss caused by the 2013 Dividend.

(b) creditors who were creditors at the time of the 2013 Dividend but were thereafter repaid suffered no loss and therefore have no claim, even if they extended further credit thereafter since

(i) such further credit was extended taking into account the circumstances of Sears Canada after the 2013 Dividend was paid; and

(ii) any losses resulting from the extension of such further credit could not have been caused by the 2013 Dividend.

112. In any event, the Former Directors determined, in good faith and on reasonable grounds, that the payment of the 2013 Dividend would not impair Sears Canada's business. The decision was an informed exercise of business judgment and, as such, could not have unfairly disregarded the interests of creditors.

No Conspiracy

113. The Former Directors did not participate in any conspiracy with the other defendants or any other person to commit an unlawful act that would harm Sears Canada or in connection with the matters raised in the Amended Amended Statement of Claim.

114. In particular, in late 2012 or early 2013, the Former Directors specifically did not agree to effect a "scheme" whereby Sears Canada would sell certain of its important assets and then declare a dividend to distribute the proceeds from the sale to shareholders, and none of the Former Directors participated in such a plan.

115. Nor did the Former Directors breach their statutory duties to Sears Canada, or act in a manner that was oppressive or unfairly prejudicial towards, or that unfairly disregarded, the interests of Sears Canada or its creditors, or commit any unlawful act, in declaring the 2013 Dividend, as alleged or at all.

116. Moreover, the Former Directors did not intend to act to the detriment of Sears Canada, nor did they have any reason to believe that the 2013 Dividend would have a detrimental effect on Sears Canada. Rather, the Former Directors (and the Board as a whole) concluded, in the exercise of their business judgment, that the payment of the 2013 Dividend was in the best interests of Sears Canada.

NO CAUSATION OF DAMAGES

117. For three-and-a-half years after the 2013 Dividend, market events and corporate decisions made by management of Sears Canada intervened to shape the ultimate fate of Sears Canada.

118. Following the approval and payment of the 2013 Dividend and until at least June 21, 2017, Sears Canada continued to obtain and rely on financial, strategic, and other advice from new

management and third party professionals and continued to carry on business in the normal course. During that time, management and other employees of Sears Canada operated stores, sold goods, undertook marketing efforts, implemented new initiatives, and made strategic, business, financial, operational and other decisions.

119. However, after the Former Directors left the Board, the Canadian retail market faced increasingly significant and unpredictable changes and stresses that posed new challenges for the continued successful operation of retailers, including Sears Canada. These events affected all segments of the retail market in Canada, including apparel, house wares, kitchen wares, office supplies, electronics, furnishings, toys, department stores, and jewellery. Numerous prominent retailers operating in Canada became insolvent, ceased operations, restructured, or reduced their footprint in the period immediately preceding Sears Canada's application for CCAA protection.

120. After payment of the 2013 Dividend, while the Former Directors (other than Bird) remained on the Board and Bird remained an officer, Sears Canada's Board and management worked to implement strategies in the best interests of Sears Canada and the Company's financial position and share price remained strong. In 2014, the Company's shares traded as high as $17.12 per share and not lower than $8.56 per share.

121. However, after the Former Directors left the Board, new management ushered in and oversaw significant shifts in the Company's strategic direction, including a plan known as "Sears 2.0". In 2016, the Company's shares never traded higher than $7 per share (*i.e.,* the high in 2016 was lower than the low in 2014) and the average trading price was only $3.68 per share. By early 2017, Sears Canada was in a difficult financial position.

122. As late as January 28, 2017, Sears Canada operated 95 full-line department stores, 830 catalogue and on-line merchandise pick-up locations, and 14 outlet stores. At that time, it had current assets of over $1 billion, of which $235.8 million was cash, with shareholder equity in the

amount of $222.2 million. However, Sears Canada suffered a sudden, significant, and unexpected decline in early and mid-2017. In that period, cash-on-hand fell to $125.3 million and inventory on hand increased to $648.1 million from $598.5 million. In addition, as of April 2017, the Company had incurred debt of $125 million under a term loan. By June 5, 2017 it had incurred additional debt of $33 million under a revolving credit facility.

123. Upon filing for CCAA protection, Sears Canada confirmed that the decline in financial performance was the result of market factors causing the decline of other retailers, as well as, among other things,

(a) unsustainable fixed costs from an overly broad retail footprint;

(b) the decline of the catalogue business and lower than expected conversion of catalogue customers to online customers; and

(c) the inability to secure an agreement for the management of credit and financial services operations.

124. The approval and payment of the 2013 Dividend did not cause Sears Canada's insolvency three and a half years later, or otherwise cause harm to Sears Canada or its stakeholders.

125. In the alternative, even if the 2013 Dividend contributed to the ultimate insolvency of Sears Canada many years later, which is denied, that result was not foreseen, nor reasonably foreseeable, by the Former Directors when the 2013 Dividend was approved by the Board.

FAILURE TO MITIGATE

126. Even if Sears Canada or its creditors suffered harm for which the Former Directors are liable, which is denied, Sears Canada has failed to mitigate such damages, including by failing to

deal with its creditors in a manner that would eliminate or lessen such damages and by taking on new debt.

THE ACTION IS TIME-BARRED

127. This action is time-barred. The declaration of the 2013 Dividend occurred on November 18, 2013. This action was commenced five years later, more than three years after the expiration of the two-year limitation period under section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. (the "Limitations Act"). Contrary to the allegations in the Amended Amended Statement of Claim, the Plaintiff's claim was discovered or discoverable more than two years before this action was commenced.

THE ACTION SHOULD BE DISMISSED

128. The insolvency of Sears Canada, or any harm to its creditors as a result of the insolvency, which harm is denied, did not result from the decisions, actions, or omissions of the Former Directors in 2013. There is no basis in fact or in law (i) to warrant a declaration that the Former Directors breached any of their duties, (ii) to set aside the 2013 Dividend or impose a constructive trust over the funds paid, or (iii) to require the Former Directors to pay the amount of the 2013 Dividend, or some portion of it, to Sears Canada or to anyone else.

129. Sears Canada continued to pay its creditors in the ordinary course, while reducing its overall debt, for many years after the 2013 Dividend was approved. Even if the 2013 Dividend impacted Sears Canada's creditors in June 2017, which is denied, only creditors who had advanced credit before the 2013 Dividend could have been impacted. Creditors who advanced credit after the 2013 Dividend did so on the basis of Sears Canada's financial and operational position and creditworthiness after payment of the 2013 Dividend.

130. The Former Directors claim the right, at law and in equity, to set off against the Plaintiff's claim the full amount of each of their unsecured claims against the estate of Sears Canada filed in the Company's CCAA proceeding.

131. There is no basis for any award of damages whatsoever, let alone the punitive damages sought by the Plaintiff.

132. The Former Directors plead and rely on the CBCA, the BIA, the CCAA, the Limitations Act, and the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and request that this action be dismissed with costs on a substantial indemnity basis.

July 29, 2019

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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF DEFENCE OF THE DEFENDANTS EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, JAMES MCBURNEY, and DONALD ROSS

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

TAB B

This is Exhibit "B" referred to in the Affidavit of Donald Campbell Ross sworn August ...26.., 2019

Commissioner for Taking Affidavits (or as may be)

INDEMNIFICATION AGREEMENT

THIS AGREEMENT is made as of this 18th day of May, 2012.

B E T W E E N:

Sears Canada Inc., a corporation incorporated under the *Canada Business Corporations Act*

(the "Corporation")

- and -

DON ROSS

(the "Indemnified Party")

RECITALS:

A. The *Canada Business Corporations Act* (the "**CBCA**") permits, and in some cases requires, the Corporation to indemnify individuals who are or were directors and/or officers of the Corporation, or who act or acted at the Corporation's request as directors and/or officers or in a similar capacity of other entities (an "**Other Entity**", a term which, for the purposes of this indemnification agreement (the "**Agreement**") shall include a corporation or other entity that becomes an Other Entity in the future). In this Agreement:

(i) each such individual, duly elected or appointed as a director and/or officer, including acting in a capacity similar to director and/or officer of an Other Entity and including an individual who has ceased to be a director and/or officer or to act in any such capacity, is referred to as a "Director" and/or "Officer", as appropriate;

(ii) unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders; and

(iii) unless otherwise indicated, references to sections are to sections in this Agreement;

B. The Indemnified Party is at present a Director or Officer or both of the Corporation;

C. Accordingly, the Corporation and the Indemnified Party wish to enter into this Agreement, and in so doing affirm that they intend that all the provisions of this Agreement be given legal effect to the full extent permitted by applicable law.

NOW THEREFORE in consideration of the sum of $1.00 now given by the Indemnified Party to the Corporation, and of the mutual covenants and agreements contained in

this Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties agree as follows:

1. Subject to sections 2 and 3, the Corporation agrees to indemnify and save harmless the Indemnified Party:

1.1 from and against all costs, charges and expenses reasonably incurred by the Indemnified Party in respect of any civil, criminal, administrative, investigative or other proceeding to which the Indemnified Party is involved by reason of being or having been a Director and or Officer; and

1.2 to the extent such costs, charges and expenses are not otherwise paid by the Corporation or Other Entity, as appropriate, from and against all costs, charges and expenses that the Indemnified Party may reasonably incur as a result of carrying out the Indemnified Party's duties as a Director and or Officer in respect of the Indemnified Party's reasonable and necessary travel, lodging or accommodation costs, charges or expenses.

2. Indemnification under section 1 shall be made only if the Indemnified Party:

2.1 acted honestly and in good faith with a view to the best interests of either the Corporation or the Other Entity, as the case may be; and

2.2 in the case of a criminal or administrative proceeding that is enforced by a monetary penalty, the Indemnified Party had reasonable grounds for believing that the Indemnified Party's conduct was lawful.

Sections 2.1 and 2.2 are referred to in this Agreement as the "**Standards of Conduct**".

3. In respect of an action by or on behalf of the Corporation or an Other Entity to procure a judgment in its favour to which the Indemnified Party is made a party by reason of being or having been a Director and/or Officer, indemnification under section 1 shall be made only after obtaining approval of the court having jurisdiction.

4. For the purposes of this Agreement:

4.1 "**proceeding**" shall include a claim, demand, suit, action, proceeding or investigation, whether threatened in writing, pending, commenced, continuing or completed, and any appeal or appeals therefrom;

4.2 "**costs, charges and expenses**" shall include:

4.2.1 subject to section 9, an amount paid to settle an action or satisfy a judgment, except in respect of an action to which section 3, above, is applicable;

4.2.2 a fine, penalty, levy or charge paid to any domestic or foreign government (federal, provincial, municipal or otherwise) or to any

regulatory authority, agency, commission or board of any domestic or foreign government, or imposed by any court or any other law, regulation or rule-making entity having jurisdiction in the relevant circumstances (collectively, a "**Governmental Authority**"), including as a result of a breach or alleged breach of any statutory or common law duty imposed on directors or officers or of any law, statute, rule or regulation or of any provision of the articles, by-laws or any resolution of the Corporation or an Other Entity;

4.2.3 an amount paid to satisfy a liability arising as a result of the failure of the Corporation or an Other Entity to pay wages, vacation pay and any other amounts that may be owing to employees or to make contributions that may be required to be made to any pension plan, retirement income plan or other benefit plan for employees or to remit to any Governmental Authority payroll deductions, income taxes or other taxes, or any other amounts payable by the Corporation or an Other Entity; and

4.2.4 reasonable legal costs on a solicitor and his own client basis, including those incurred in enforcing the Indemnified Party's rights under this Agreement; and

4.3 the Indemnified Party shall be considered to be "**involved**" in any proceeding if the Indemnified Party has any participation whatsoever in such proceeding, including merely as a witness.

5. Upon the Indemnified Party becoming aware of any proceeding which may give rise to indemnification under this Agreement, the Indemnified Party shall give written notice to the Corporation, directed to its (a) Chief Executive Officer or President and (b) General Counsel, as soon as is practicable, provided however that failure to give notice in a timely fashion shall not disentitle the Indemnified Party to indemnification unless the Corporation suffers actual prejudice by reason of the delay.

6. The Corporation may conduct any investigation it considers appropriate of any proceeding of which it receives notice under section 5, and shall pay all costs of that investigation.

7. The parties wish to facilitate the payment by the Indemnified Party of ongoing costs in connection with matters for which indemnification under this Agreement is provided. Accordingly, the parties agree as follows:

7.1 subject to section 7.2, the Corporation shall, upon demand, make advances ("**Expense Advances**") to the Indemnified Party of all reasonable amounts for which the Indemnified Party seeks indemnification under this Agreement before the final disposition of the relevant proceeding. In connection with such demand, the Indemnified Party shall provide the Corporation with a written affirmation of the Indemnified Party's good faith belief that the Indemnified Party has met the Standards of Conduct, along with sufficient particulars of the costs, charges and expenses to be covered by the proposed

Expense Advance to enable the Corporation to make an assessment of their reasonableness;

7.2 the Corporation shall make Expense Advances to the Indemnified Party in accordance with the provisions of the CBCA; and

7. 7.3 the Indemnified Party shall execute a separate undertaking which shall set out the Indemnified Party's acknowledgement and agreement to repay to the Corporation, upon demand, all Expense Advances in the event the Indemnified Party has not met the Standards of Conduct.

8. The indemnities in section 1 shall not apply in respect of any proceeding initiated by the Indemnified Party:

8.1 against the Corporation or an Other Entity, unless it is brought to establish or enforce any right under this Agreement;

8.2 against any Director or Officer unless the Corporation or the Other Entity, as the case may be, has joined in or consented to the initiation of such proceeding; or

8.3 against any other corporation, partnership, trust, joint venture, unincorporated entity or person, unless it is a counterclaim.

9. The Corporation shall be entitled to participate, at its own expense, in the defence of the Indemnified Party in any proceeding. If the Corporation so elects after receipt of notice of a proceeding, or the Indemnified Party in that notice so directs, the Corporation shall assume control of the negotiation, settlement or defence of the proceeding, in which case the defence shall be conducted by counsel chosen by the Corporation and reasonably satisfactory to the Indemnified Party. If the Corporation elects to assume control of the defence, the Indemnified Party shall have the right to participate in the negotiation, settlement or defence of the proceeding and to retain counsel to act on the Indemnified Party's behalf, in which case the Corporation shall reimburse the Indemnified Party for any fees and disbursements of that counsel if a conflict of interests has arisen between the Corporation and the Indemnified Party. Notwithstanding anything contained herein, the Corporation shall not be responsible for fees and expenses of more than one counsel separate from counsel for the Corporation for all Directors and Officers in connection with any action or separate but similar or related actions arising out of the same general allegations or circumstances. The Indemnified Party and the Corporation shall cooperate fully with each other and their respective counsel in the investigation related to, and defence of, any proceeding and shall make available to each other all relevant books, records, documents and files and shall otherwise use their best efforts to assist each other's counsel to conduct a proper and adequate defence.

10. In respect of the settlement of any proceeding, the parties agree as follows:

10.1 the Corporation may not, without the prior written consent of the Indemnified Party (which consent shall not be unreasonably withheld or delayed) enter into an agreement to settle any proceeding involving the Indemnified Party;

10.2 if the Indemnified Party refuses after being requested by the Corporation, acting reasonably, to give consent to the terms of a proposed settlement in accordance with section 10.1 which is otherwise acceptable to the Corporation, the Corporation may require the Indemnified Party to negotiate or defend the Claim independently of the Corporation. In that case, any amount recovered by the claimant in excess of the amount for which settlement could have been made by the Corporation shall not be recoverable under this Agreement, and the Corporation will only be responsible for costs, charges and expenses up to the time at which settlement could have been made;

10.3 the Corporation shall not be liable for any settlement of any proceeding effected without its prior written consent (which consent shall not be unreasonably withheld or delayed);

10.4 the Indemnified Party shall have the right to negotiate a settlement in respect of any proceeding, provided that unless the Corporation has approved the settlement, the Indemnified Party shall pay any compensation or other payment to be made under the settlement and the costs of negotiating and implementing the settlement, and shall not seek indemnity from the Corporation in respect of such compensation, payment or costs; and

10.5 the settlement of a proceeding shall not create a presumption that the Indemnified Party did not meet or would not have met the Standards of Conduct.

11. Should any payment made pursuant to this Agreement, including the payment of insurance premiums or any payment made by an insurer under an insurance policy, be deemed to constitute a taxable benefit or otherwise be or become subject to any tax or levy, then the Corporation shall pay any amount as may be necessary to ensure that the amount received by or on behalf of the Indemnified Party, after the payment of or withholding for such tax, fully reimburses the Indemnified Party for the actual cost, expense or liability incurred by or on behalf of the Indemnified Party.

12. Each of the provisions contained in this Agreement is distinct and severable and a declaration of invalidity or unenforceability of any such provision or part thereof by a court of competent jurisdiction shall not affect the validity or enforceability of any other provision hereof. To the extent permitted by applicable law, the parties waive any provision of law which renders any provision of this Agreement invalid or unenforceable in any respect. The parties shall engage in good faith negotiations to replace any provision which is declared invalid or unenforceable with a valid and enforceable provision, the economic effect of which comes as close as possible to that of the invalid or unenforceable provision which it replaces.

13. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

14. This Agreement shall survive until six years after the Indemnified Party has ceased to be a Director or Officer.

15. Except as expressly provided in this Agreement, no amendment or waiver of this Agreement shall be binding unless executed in writing by the party to be bound thereby. No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver unless otherwise expressly provided.

16. This Agreement shall enure to the benefit of the Indemnified Party and the Indemnified Party's heirs, administrators, executors and personal representatives and shall be binding upon the Corporation and its successors.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

INDEMNIFIED PARTY

Donald C Ross

Name: DON ROSS
Position: Director

SEARS CANADA INC.

by: _____

Name: Franco Persugini
Title: Corporate Secretary

TAB C

This is Exhibit "C" referred to in the Affidavit of Donald Campbell Ross sworn August ...26..., 2019

Commissioner for Taking Affidavits (or as may be)

Skarzynski | Black

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P 212.820.7700 | F 212.820.7740
skarzynski.com

Tammy Yuen
Direct Line: 212.820.7757
tyuen@skarzynski.com

August 24, 2018

VIA EMAIL

Carolyn H. Rosenberg, Esq.
ReedSmith LLP
10 South Wacker Drive
Chicago, IL 60606-7507
crosenberg@reedsmith.com

Re: *Sears Canada, Inc.*

Insured:	Sears Holdings Corporation
Insurer:	XL Specialty Insurance Company
Policy No.:	ELU149912-17 (Primary A-Side)
Policy Period:	May 15, 2017 to May 15, 2018
XL Ref. No.:	0004070548
SB File No.:	21995

Dear Ms. Rosenberg:

As you know, this firm is legal counsel to XL Specialty Insurance Company ("XL") in connection with its investigation and analysis of coverage under the captioned A-Side Management Liability Policy (the "A-Side Policy") issued to Sears Holdings Corporation ("Sears Holdings").

I write in response to your letters dated June 18, 2018 and July 27, 2018[1] regarding coverage for the directors and officers of Sears Canada under the captioned policy.

As you note in your letter, Section II(P) of the A-Side Policy, as amended by Endorsement No. 41, defines Subsidiary to mean "any organization during any time in which the Parent Company possesses, directly or indirectly through one or more

[1] To the extent that this letter does not respond to other points raised in those letters, XL reserves its right to respond at a later date; and this letter shall not be construed as a waiver or agreement as to those issues.

Subsidiary(s), the power to control, manage or direct by reason of the Parent Company's rights and obligations pursuant to any contract relations to such organization."

Your position appears to focus on the phrase "during any time," and you argue that because the alleged Wrongful Acts in the 129 Ontario Action occurred when Sears Canada was a Subsidiary, the A-Side Policy provides coverage to the Sears Ds&Os.

The definition of Subsidiary and the language you cite, however, must be read in conjunction with the other policy terms, including Section IV(C)(3). Section IV(C)(3) provides in, relevant part, that:

> If, *during the Policy Period*, any entity ceases to be a Subsidiary, the coverage provided under this Policy shall continue to apply to the Insured Persons who because of their service with such Subsidiary were covered under this Policy but only with respect to a Claim for a Wrongful Act that occurred or allegedly occurred prior to the time such Subsidiary ceased to be a Subsidiary of the Company.

(Emphasis added).

Your interpretation of the A-Side Policy to provide coverage for any Claim made at any time against a Sears Canada D&O for Wrongful Acts committed while Sears Canada was a Subsidiary would render Section IV(C)(3) meaningless. That is, this section preserves coverage for Insured Persons in their capacity with a Subsidiary *if the entity ceases to be a Subsidiary during the Policy Period*. It does not preserve coverage for directors and officers of an entity that ceased to be a Subsidiary before the Policy Period.

As you acknowledge in your letter, Sears Canada ceased to be a Subsidiary of Sears Holdings in or around October 15, 2014, several years prior to the inception of the A-Side Policy's policy period. Thus, because Sears Canada did not cease to be Subsidiary of Sears Holdings during the Policy Period, there is no coverage for the directors and officers of Sears Canada under the Policy in their capacity with Sears Canada. Any other reading would ignore the italicized language in Section IV(C)(3) quoted above.

Even if the A-Side Policy afforded coverage to the directors and officers of Sears Canada, the Insuring Agreement states that such coverage is provided "except to the extent that such Loss is paid by any other Insurance Program or as indemnification or

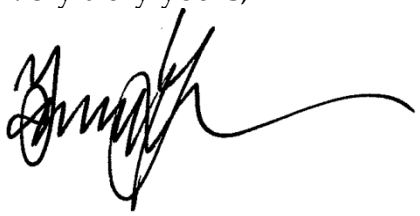
advancement any source." In this regard, the former directors and officers of Sears Canada have sought payment from Sears Holdings in connection with the Sears Canada CCAA proceeding and we understand that this motion for payment is pending. Though XL maintains that the A-Side Policy does not provide coverage for the Ds&Os of Sears Canada, any coverage would be excess of indemnification provided by Sears Holdings. To the extent that Sears Holdings has denied any request for indemnification from the Ds&Os of Sears Canada, please provide the basis for this denial.

Finally, the 129 Ontario Action for which the former Ds&Os of Sears Canada seek coverage under the A-Side Policy was commenced in or around October 21, 2015, before the inception of the Policy Period. Thus, the 129 Ontario Action is a Claim first made in the May 15, 2015 to May 15, 2016 Policy Period.[2] The relevant provisions of the May 15, 2015 to May 15, 2016 Policy are substantially the same as the A-Side Policy, though the definition of Subsidiary is more limited under the May 15, 2015 to May 15, 2016 Policy. Thus, XL's position as to coverage is the same under both policies. XL also reserves all rights under the May 15, 2015 to May 15, 2016 Policy, including but not limited to, the notice requirements under that Policy.

XL invites you to please provide any information that you believe is relevant to its coverage analysis. In the meantime, XL is continuing to proceed under a full reservation of rights under the A-Side Policy, law and equity, including with respect to any other defenses to coverage not discussed herein or in any prior correspondence including, but not limited to, notice, whether the amounts sought constitute Loss.

Should you have any questions after review of this letter, please feel free to contact me.

Very truly yours,



Tammy Yuen

[2] While XL understands that the plaintiffs in the 129 Ontario Action filed a separate suit on or around July 5, 2013 (the "2013 Action"), the 2013 Action does not name any individual as defendants or include any allegations against any individual; and the 2013 Action was not noticed to XL. Thus, the 129 Action is not a Claim first made on or around July 5, 2013.

cc: *All via email*
Rebecca Pidlak (rebecca.pidlak@xlcatlin.com)
Katherine Bottcher (Katherine.bottcher@aon.com)
John Birch (jbirch@casselsbrock.com)
David Luttinger (dluttinger@cov.com)
Kenneth McBrady, Esq. (kmcbrady@skarzynski.com)

4813-1200-8304, v. 1

TAB D

This is Exhibit "D" referred to in the Affidavit of Donald Campbell Ross sworn August 26, 2019

Commissioner for Taking Affidavits (or as may be)

ReedSmith
Driving progress
through partnership
Carolyn H. Rosenberg
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CONFIDENTIAL COMMUNICATION

September 7, 2018

Via Electronic Mail

XL Professional Insurance
100 Constitution Plaza, 17th floor
Hartford, CT 06103

RE: 129 Ontario Action
Named Insured: Sears Holdings Corporation ("SHC")
Underwriter: XL Specialty Insurance Company
Policy: Cornerstone A-Side Management Liability Insurance Policy
No.ELU139030-15

Dear Sir or Madam:

We are insurance coverage counsel to SHC in connection with the above-captioned matter.

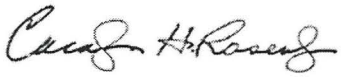
In the attached August 24, 2018 letter, XL Specialty Insurance Company, which has notice of the 129 Ontario Action and has to date been analyzing coverage for the Claim under the Side A May 15, 2017- May 15, 2018 Policy Period, asserts for the first time that the Action is a Claim first made in the May 15, 2015 to May 15, 2016 Policy Period. Accordingly, SHC is hereby providing a copy of the 129 Ontario Action to XL and all of the excess insurers in the 2015-2016 Policy Period. The 129 Ontario Action is a putative class action lawsuit filed in the Ontario Superior Court of Justice by an Ontario Sears Hometown store dealer, as class representative, against Sears Canada Inc., Sears Holdings Corporation, ESL Investments Inc., William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney, and Douglas Campbell.

In its August 24, 2018 letter, XL further reserves its rights under the 2015-2016 Policy, "including but not limited to, the notice requirements under that Policy." Endorsement No. 31 to

the 2015-2016 XL Policy provides that "the late notice of any Claim to the Insurers, as described in Section IV Condition (D)(1) of the Policy, will not be a defense to coverage unless the Insurer proves that it was actually prejudiced thereby." If XL pursues this defense, it will be unable to meet the carrier's heavy burden to show "actual prejudice," particularly since the 129 Action was stayed a few months after it was filed and remains stayed.

The Insureds continue to reserve all, and do not waive any, of their rights under the Policies or applicable law with respect to coverage.

Very truly yours,



Carolyn H. Rosenberg
Mark S. Hersh

cc: Excess Insurers

TAB E

This is Exhibit "E" referred to in the Affidavit of Donald Campbell Ross sworn August 26, 2019

Commissioner for Taking Affidavits (or as may be)

WILFORD|CONRAD|LLP

WILFORD | CONRAD | LLP
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May 16, 2019

VIA E-MAIL ONLY

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Ms. Jesslyn G. Maurier
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maurierj@bennettjones.com

Re:	**Insured:**	**Sears Holdings Corporation**
	Matter:	**Claims Against Former Directors of Sears Canada, Inc.**
	Insurer:	**QBE Insurance Corporation**
	Policy No:	**QPL0045025**
	Policy Type:	**Excess Liability Policy (Side A Only)**
	Policy Period:	**May 15, 2015 to May 15, 2016**
	QBE Claim No.:	**627951N**
	Our Claim No.:	**48-0004**

Dear Mr. Hahn & Ms. Maurier:

As you know, we have been retained to represent the interests of QBE Insurance Corporation ("QBE"), which issued Excess Liability Policy No. QPL0045025 to Sears Holdings Corporation ("SHC") for the period May 15, 2015 to May 15, 2016 (the "Excess Policy"). We are directing this correspondence to you as the authorized representatives of Klaudio Leshnjani, William R. Harker, William C. Crowley, Donald C. Ross, James McBurney, Ephraim J. Bird, Calvin R. McDonald, Ronald Boire, Deidra C. Merriwether, Douglas Campbell, Raja Khanna and Deborah Rosati (the "Former Directors") for insurance coverage purposes in the above-referenced matter. This letter is intended to supplement any prior communications from QBE with respect to the potential coverage available under the Excess Policy.

For the reasons discussed below, we regret to inform you that the Excess Policy does not provide coverage for the claims made against the Former Directors in the underlying litigation.

Please understand that QBE's position is based, in part, upon review of the unsubstantiated allegations contained in the underlying matters. QBE does not intend to suggest that those allegations have any legal or factual merit. Additionally, please understand that the discussion set

forth below is not intended to provide an exhaustive analysis of all potentially applicable coverage issues. Coverage under the Excess Policy is subject to certain terms, conditions, and exclusions, the application of which cannot be finally ascertained until the conclusion of the underlying proceedings or further investigation into this matter. To the extent necessary, QBE reserves its rights to supplement their coverage position set forth in this correspondence.

I. RELEVANT FACTUAL BACKGROUND

A. The 2015 Ontario Proceeding and CCAA Proceeding

It is our understanding that each of the above individuals is a former director of Sears Canada, Inc. ("SCI"). The Former Directors are the subject of a proceeding filed on October 21, 2015 on behalf of 1291079 Ontario Limited ("129 Ontario") in the Ontario Superior Court of Justice (the "2015 Ontario Proceeding") and three additional proceedings that have been filed in the context of a CCAA Proceeding involving SCI initiated on June 22, 2017 (the "CCAA Proceeding").[1] The 2015 Ontario Proceeding was first notified to QBE on September 10, 2018. QBE subsequently was made aware of the CCAA Proceeding on October 25, 2018.

The 2015 Ontario Proceeding was filed on behalf of 129 Ontario, individually, and as the proposed representative for a class of plaintiffs described as "all persons carrying on business as a Hometown store under a Dealer Agreement with Sears at any time on or after January 1, 2011". The 2015 Ontario Proceeding was filed for the express purpose of protecting 129 Ontario's ability to recover any potential award rendered in a prior class action proceeding filed by 129 Ontario against SCI in the Ontario Superior Court of Justice on July 5, 2013 (the "2013 Ontario Proceeding").[2] Specifically, in the 2015 Ontario Proceeding, 129 Ontario alleges that, since the initiation of the 2013 Ontario Proceeding, the Former Directors have acted "in a manner that was oppressive and unfairly prejudicial to, and that unfairly disregarded the interests of, the Class" by stripping SCI of valuable assets, such that "Sears would likely be bankrupt or insolvent by the time the Class succeeded" in the 2013 Ontario Proceeding. To that end, the 2015 Ontario Proceeding seeks the same damages as requested in the 2013 Ontario Proceeding (*i.e.* recovery of damages in excess of $100,000,000 plus pre- and post-judgment interest, and costs).

129 Ontario alleges that, in 2011, SCI began incurring large operating losses. By 2013, media sources reported that SCI was on the verge of collapse. Although SCI was losing money through its operations, SCI held valuable capital assets, particularly long-term leases in prime

[1] It is our understanding that the Former Directors were being indemnified in the 2015 Ontario Proceeding by SCI prior to the initial order being entered in the CCAA Proceeding on June 22, 2017 at which time the 2015 Ontario Proceeding was stayed.

[2] The 2013 Ontario Proceeding was certified to proceed on a class basis on September 8, 2014. The certified class includes "all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to June 22, 2017."

shopping centers that operated at below fair market value rental rates. Between June 2013 and November 2013, SCI allegedly began liquidating those assets at the direction of and for the benefit of SHC and ESL Investments, Inc. and its affiliates ("ESL"), and at the expense of its creditors, including 129 Ontario and other plaintiffs in the 2013 Ontario Proceeding. Rather than reinvesting these funds to offset losses and save the company, SCI discharged employees and ceased services which were critical to the success of the Hometown stores and paid substantial dividends to SHC and ESL.

On November 19, 2013, despite reporting poor third quarter financial results, SCI declared an extraordinary cash dividend in the amount of $509 million to be paid primarily to SHC and ESL on December 6, 2013 (the "Extraordinary Dividend"). According to 129 Ontario, the Extraordinary Dividend was declared by the Former Directors and paid by SCI "with knowledge by the defendants that the Sears Hometown store network was and would continue to be abandoned by SCI, and also that the class members were experiencing – and would continue experiencing – massive losses that would lead to their financial demise."

The 2015 Ontario Proceeding alleges that on November 26, 2013, after the Extraordinary Dividend was declared but prior to its payment, counsel for 129 Ontario in the 2013 Ontario Proceeding[3] wrote to SCI requesting assurances that, given SCI financial condition, "it had set aside a sufficient reserve to satisfy a judgement against SCI should the Class Action be certified and succeed on the merits". SCI allegedly did not respond.

Further, the 2015 Ontario Proceeding alleges that, on December 3, 2013, counsel for 129 Ontario in the 2013 Ontario Proceeding "wrote to each Director to put them on notice that should SCI be unable to satisfy an eventual judgment in the [2013 Ontario Proceeding], that each Director who authorized the Extraordinary Dividend may be jointly and severally liable with SCI for such damages" (the "2013 Letter"). According to the pleading, no answer was provided in response to that correspondence and on December 6, 2013, SCI paid the Extraordinary Dividend.

129 Ontario maintains that by directing and authorizing SCI to pay the Extraordinary Dividend and its other actions as described above, the Former Directors engaged in conduct that was prejudicial to 129 Ontario, as well as the putative class.

On December 4, 2018, the stay entered in connection with the 2015 Ontario Proceeding was lifted. On January 18, 2019, 129 Ontario filed a motion seeking to certify the same class of plaintiffs that was previously certified in the 2013 Ontario Proceeding.

On December 19, 2018, the following Statements of Claim for which the Former Directors seek coverage were formally filed in the CCAA Proceeding:

[3] 129 Ontario is represented by the same counsel, David Sterns of Sotos LLP, in the 2013 Ontario Proceeding and the 2015 Ontario Proceeding.

1) The SCI Registered Pension Plan Claim (the "Pension Plan Claim");[4]

2) The SCI Monitor Transfer Under Value Claim (the "TUV Claim"); and

3) The SCI Litigation Trustee Claim.

Generally, each of these claims seek the recovery of damages, including rescission and disgorgement, under a variety of theories of liability, from the Former Directors as a result of their alleged wrongful approval of the payment of an Extraordinary Dividend in November 2013. The claims allege that the "primary recipients" of these distributions were SHC, ESL, and Edward Lampert. The claims further allege that the payment of the Extraordinary Dividend diverted funds from SCI, when the Former Directors knew or ought to have known that the best interests of SCI would be best served by reinvesting the funds in the business and that as a result of their actions SCI was rendered insolvent and unable to fulfill its obligations to its creditors.

B. The 2013 Ontario Proceeding

The 2013 Ontario Proceeding was filed by 129 Ontario on behalf of itself and approximately 260 corporations which operate as retailers under Sears' Hometown Store Program throughout Canada.[5] The Hometown Store Program is a network of locally owned businesses, which entered into Dealer Agreements with SCI in order to sell Sears-brand products. The 2013 Ontario Proceeding asserts that the Home Store Program is a "predatory scheme" through which SCI concealed the economic reality of the program from prospective dealers by disregarding franchise disclosure laws, maintaining an "impossible" compensation structure and sales tactics, including the "poaching" of customers, and operated to benefit SCI and harm the Hometown dealers. The 2013 Ontario Proceeding also alleges that since 2014, SCI has failed to reasonably protect its Hometown dealers by cutting financial support and personnel and eroding the "Sears" brand in the public eye. Accordingly, the plaintiffs in the 2013 Ontario Proceeding seek of $100,000,000 plus pre- and post-judgment interest, and costs.

C. The 2013 Letter

As alleged in the 2015 Ontario Proceeding, the 2013 Letter was issued to the Former Directors by counsel for 129 Ontario in the 2013 Ontario Proceeding after declaration but prior to

[4] Morneau Shepell Ltd. was appointed as administrator of the Sears Canada Inc. Registered Pension Plan on October 16, 2017. As such, this matter is also referred to in various pleadings and correspondence as the "Morneau Shepell Ltd. Claim". We also note that a separate claim previously advanced by the Superintendent of Financial Services (Ontario) will now be handled as part of the Pension Plan Claim.

[5] This number has apparently grown to approximately 351 corporations. *See*, Notice of Motion (Certification), Pg. 3, Para. 2 (filed on January 18, 2019).

payment of the Extraordinary Dividend.[6] The 2013 Letter also references the prior request for assurances made by counsel for 129 Ontario that SCI had sufficient reserves to satisfy any judgment in the 2013 Ontario Proceeding.

In addition, the 2013 Letter included a link to a copy of the Statement of Claim in the 2013 Ontario Proceeding and advised the Former Directors that they were being "put…on notice that should Sears be unable to satisfy an eventual judgment against Sears in the Class Action, that each Director who authorized the Extraordinary Dividend may be jointly and severally liable with Sears for such damages." The 2013 Letter also directed the Former Directors to the relevant Canadian statute providing for a personal liability of directors if a dividend is improperly declared.

II. COVERAGE ANALYSIS

QBE issued Excess Insurance Policy No. QPL0045025 to Sears Holdings Corporation for the policy period of May 15, 2015 to May 15, 2016 (the "Policy Period"). The Excess Policy, subject to its own additional or differing terms, follows the terms, conditions and limitations of the primary policy, Policy No. ELU139030-15, issued by XL Specialty Insurance Company ("XL") to SHC for the same Policy Period (the "Primary Policy"). The Excess Policy contains a $15 million any one Claim and aggregate Limit of Liability[7] excess of $15 million in Underlying Insurance.[8]

The Excess Policy's Insuring Clause provides that:

> The Insurer shall provide coverage in accordance with the same terms, conditions and limitations of the **Followed Policy**, including those involving policy termination, representations and severability, notice and extended reporting period, and in accordance with the terms and conditions set forth herein.[9]

[6] QBE notes that, despite its request of December 4, 2018, the 2013 Letter was not provided by counsel for the Former Directors but was instead obtained through an independent review by QBE of certain pleadings filed in the CCAA Proceedings.

[7] By virtue of a prior confidential settlement, the remaining aggregate Limit of Liability under the Excess Policy is $13 million.

[8] Section II (as amended by endorsement), General Conditions, Para. (a) of the Excess Policy provides that any obligation that QBE might have with respect to the Former Directors is not be triggered until the exhaustion of the Limit of Liability of the Primary Policy. By email dated May 7, 2019, counsel for the Former Directors advised that it is anticipated that the Limit of Liability of the Primary Policy may be exhausted "within the next few months or earlier."

[9] The Excess Policy should be reviewed together with this letter, which does not modify the terms of the Excess Policy.

As previously advised, while the Excess Policy generally follows form to the Primary Policy, QBE is not obligated to adopt, accept or agree with any coverage position taken by XL under the Primary Policy, including but not limited to any relatedness or allocation positions. QBE controls its own position as to the availability of coverage for any matter independent of any decision made by XL.

Section I of the Primary Policy provides coverage to Insured Persons for Loss resulting from a Claim first made during the Policy Period for a Wrongful Act, but only to the extent that such Loss has not been paid by any other Insurance Program, indemnified, or advanced from any source.

Pursuant to Definition II(I)(1), "**Insured Persons**" means, in relevant part, "any past, present, or future director or officer, general counsel, or member of the Board of Managers of the **Company** and any person serving in a functionally equivalent role for the **Parent Company** or any **Subsidiary** operating or incorporated outside the United States". Until October 15, 2014, SCI was a Subsidiary of SCH, as that term is defined in the Primary Policy. The Former Directors are alleged to have served on the board of directors of SCI prior to October 15, 2014. As such, the Former Directors constitute Insured Persons under the Primary Policy.

Definition II(C) defines "**Claim**" to include:

> (1) a written demand for monetary or non-monetary relief;
>
> (2) any civil or criminal judicial proceeding in a court of law or equity, arbitration or other alternative dispute resolution; …
>
> * * *

"**Wrongful Act**" is defined, in relevant part, at Definition II(Q) as:

> (1) any actual or alleged act, error, or omission, misstatement, misleading statement, neglect or breach of duty by an **Insured Person**, as defined in DEFINITION (I)(1), while acting in his or her capacity as a director, officer, general counsel, or member of the Board of Managers of the **Company** or a functionally equivalent role for the **Parent Company** or any **Subsidiary** operating or incorporated outside of the United States.
>
> (2) any matter asserted against an **Insured Person** solely by reason of his or her status as a director, officer, general counsel or member of the Board of Managers of the **Company**.

Based upon the foregoing provisions, coverage for Insured Persons is contingent upon a Claim being first made during the Policy Period.[10] It is undisputed that the Pension Plan Claim, the TUV Claim and the SCI Litigation Trustee Claim, in and of themselves, do not constitute Claims first made during the Policy Period as they were asserted only after SCI initiated the CCAA Proceeding on June 22, 2017 – more than a year after the expiration of the Policy Period. It is our understanding that the Former Directors seek coverage from QBE for these matters on the basis that they constitute "**Interrelated Claims**" with the 2015 Ontario Proceeding and would be deemed first made on October 21, 2015 when the 2015 Ontario Proceeding was filed.

However, QBE has determined that coverage is not available under the Excess Policy for the Former Directors with respect to any of the above-referenced matters because these matters are not Claims first made during the Policy Period. Although the 2015 Ontario Proceeding was filed during the Policy Period, albeit not noticed until September 2018, the claims asserted therein were first made against the Former Directors in the 2013 Letter.

A. <u>Claim First Made Prior to the Policy Period</u>

Initially, Section IV(G) of the Primary Policy defines "**Interrelated Claims**" as follows:

> All **Claims** arising from **Interrelated Wrongful Acts** shall be deemed to constitute a single **Claim** and shall be deemed to have been made at the earliest time at which the earliest such **Claim** is made or deemed to have been made pursuant to CONDITION (D)(1) or (2) above, if applicable.

Definition II(J) of the Primary Policy defines "**Interrelated Wrongful Acts**" as:

> > **Wrongful Acts** based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related, or series of related, facts, circumstances, situations, transactions, or events.

As noted above, "**Claim**" is defined to include a written demand for non-monetary relief. The 2013 Letter directed to the Former Directors, in their capacity as directors of SCI, sought to prevent the payment of the Extraordinary Dividend declared by the Former Directors after requests for assurances that SCI had sufficient reserves to cover any judgment entered in the 2013 Ontario Proceeding went unanswered. To this end, the 2013 Letter provided a hyperlink to the Statement of Claim in the pending 2013 Ontario Proceeding against SCI. Counsel for 129 Ontario, the named plaintiff in the 2013 Ontario Proceeding, noted that the Extraordinary Dividend was due to be paid

[10] In addition, coverage is limited to the extent that any Loss is paid by any other Insurance Program or is indemnified or advanced from any source. Based on presently available information, QBE continues to reserve all rights with respect to the availability of indemnity with respect to these matters, including whether and to what extent indemnification is, was, or will be provided by SHC, SCI, ESL, and/or any other source to the Former Directors in connection with these claims.

three days after the 2013 Letter. The 2013 Letter cited the relevant Canadian statute providing for personal liability of company directors where a dividend is declared that would leave the company unable to pay its liabilities – the same statute the Former Directors are alleged to have violated in the subsequent 2015 Ontario Proceedings. In the letter, counsel for 129 Ontario advised the Former Directors that "should Sears be unable to satisfy an eventual judgment against Sears in the Class Action, that each Director who authorized the Extraordinary Dividend may be jointly and severally liable with Sears for such damages."

The 2013 Letter constitutes a Claim first made on December 3, 2013 as it is a written demand for non-monetary relief, including a demand for assurances of sufficient reserves and injunctive relief to prevent the payment of the Extraordinary Dividend, directed to the Former Directors in their capacity as directors of SCI. In the 2013 Letter, counsel for the plaintiffs' alleges, among other things, that the Former Directors failed to respond to requests for assurances of sufficient reserves to fund any judgment in the 2013 Ontario Proceeding and may have breached their fiduciary duties related to declaration of the Extraordinary Dividend.

The Primary Policy provides that "[a]ll **Claims** arising from **Interrelated Wrongful Acts** shall be deemed to constitute a single **Claim** and shall be deemed to have been made at the earliest time at which the earliest such **Claim** is made or deemed to have been made…."

The alleged Wrongful Acts by the Former Directors in the 2015 Ontario Proceeding are based on, arise out of, result from, are a consequence of or involve the same or related, facts, circumstances or situations described in the 2013 Letter. In this regard, both the 2013 Letter and the 2015 Ontario Proceeding are based on, arise out of, result from or involve the Former Directors alleged improper declaration of the Extraordinary Dividend in November 2013 and its subsequent payment by SCI on December 6, 2013. The 2013 Letter was issued for the purpose of reiterating the request for assurances of sufficient reserves, seeking injunctive relief to prevent the payment of the Extraordinary Dividend by the Former Directors, and placing the Former Directors "on notice" of the claims and damages that are now asserted in the 2015 Ontario Proceeding. As such, the 2015 Ontario Proceeding is an Interrelated Claim with the 2013 Letter and is therefore deemed to constitute a single Claim first made on December 3, 2013 pursuant to Section IV(G) of the Primary Policy. Thus, coverage is not available under the Excess Policy for the 2015 Ontario Proceeding.

As noted above, the Pension Plan Claim, the TUV Claim, and the SCI Litigation Trustee Claim do not constitute Claims first made during the Policy Period. Rather, we understand that the Insureds believe coverage is triggered for such matters as they constitute Interrelated Claims with the 2015 Ontario Proceeding. However, as explained above, the 2015 Ontario Proceeding is an Interrelated Claim with the 2013 Letter and is therefore deemed to constitute a single Claim first made on December 3, 2013, prior to the inception of the Excess Policy. Accordingly as the 2015 Ontario Proceeding does not constitute a Claim first made during the Policy Period, coverage is also unavailable for the Pension Plan Claim, the TUV Claim or the SCI Litigation Trustee Claim under the Excess Policy.

QBE respectfully suggests that the Former Directors immediately notify any and all insurers providing coverage to SCH or SCI for the policy period during which the 2013 Letter was sent to the Former Directors.

B. Additional Reservations

Notwithstanding the above, and out of an abundance of caution, QBE also wishes to direct your attention to certain policy provisions which may preclude or otherwise limit the availability of coverage under the Excess Policy for the Former Directors.

Initially, a review of the 2013 Ontario Proceeding and the 2015 Ontario Proceeding clearly establishes that there is a substantial common nexus of facts and circumstances between such matters. Both lawsuits involve the same plaintiff and similar, if not identical, damages. In fact, the 2015 Ontario Proceeding expressly alleges that the 2015 Ontario Proceeding was filed solely in effort to ensure a recovery from SCI in the 2013 Ontario Proceeding.[11] Moreover, the 2013 Letter and the 2015 Ontario Proceeding are a simply a continuation of the allegations originally asserted in the 2013 Ontario Proceeding. More specifically, these matters stem from allegations that the defendants engaged in a pattern of oppressive and unfair conduct designed to benefit SCI (and ultimately SCH and ESL) to the financial detriment of the Hometown stores. The 2013 Ontario Proceeding is repeatedly referenced in the 2015 Ontario Proceeding. As such, the 2013 Letter and the 2015 Ontario Proceeding may constitute Interrelated Claims with the 2013 Ontario Proceeding resulting in the Claim being deemed first made on July 5, 2013.

In addition, Section I of the Primary Policy only provides coverage to **Insured Persons** to the extent that **Loss** has not been paid by any other Insurance Program, indemnified, or advanced from any source. To the extent that any Former Director has been indemnified or is entitled to indemnification from any source, including but not limited to SCI, SCH or ESL, no coverage is available under the Excess Policy. As such, QBE must hereby reserve its right to assert this defense in the future.

QBE next directs your attention to Section III, (B) (2) of the Primary Policy, as amended by Endorsement 15, which provides as follows:

> (B) The Insurer shall not be liable to make any payment for **Loss** in connection with any **Claim**:

[11] In correspondence dated November 28, 2018 from Paul Stein of Gowling WLG (Canada) LLP, counsel for XL with respect to the primary policy issued to SCI for the 2016-17 policy period, to John Birch of Cassels Brock, as defense counsel for the Former Directors, Mr. Stein stated that the 2015 Ontario Proceeding "essentially duplicates" the 2013 Ontario Proceeding. It does not appear that any representative for the Former Directors objected to Mr. Stein's characterization.

TAB F

This is Exhibit "F" referred to in the Affidavit of Donald Campbell Ross sworn August ...26..., 2019

Commissioner for Taking Affidavits (or as may be)

Sotos

SOTOS LLP | LAWYERS & TRADE-MARK AGENTS

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Our File No. 20667

December 3, 2013

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

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13 Roxborough Street West
Toronto ON MSR 1T9

Dear Sirs and Madam:

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

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

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

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

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

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

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

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

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

Yours very truly

SOTOS LLP

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

TAB G

This is Exhibit "G" referred to in the Affidavit of Donald Campbell Ross sworn August ...26.., 2019

Commissioner for Taking Affidavits (or as may be)

CASSELS BROCK
LAWYERS

August 8, 2019

BY E-MAIL

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Toronto, Ontario M5C 3G5

Dear Counsel:

Re: Various Litigation Involving the Former Directors of Sears Canada Inc.

As you are all aware, coverage under the 2015-2016 directors' and officers' policy issued to Sears Holdings Corporation (the "D&O Policy") was denied by the first excess insurer, QBE Insurance Corporation. Our clients engaged Canadian coverage counsel, Jim Doris of Tyr LLP, and commenced an application before the Superior Court of Justice (Commercial List) returnable on August 27, 2019 seeking, among other things, declaratory relief for coverage.

The insurers have advised that they intend to bring a motion to challenge the jurisdiction of the Ontario court to decide the coverage issue. We do not believe that the insurers will agree to argue the jurisdiction motion at the same time as the application since they have expressed a concern about attornment. Accordingly, the application for declaratory relief currently scheduled for August 27, 2019 will likely need to be adjourned and a new date set for the jurisdictional motion.

We have recently been advised by the primary insurer, XL Speciality Insurance Company, that coverage under the primary layer of the D&O Policy has been completely exhausted and, accordingly, no further defence cost funding is available. In addition, significant outstanding legal costs incurred by the Former Directors remain unpaid with no further funding available under the D&O Policy. The Former Directors are attempting to reach an agreement with the insurers for interim funding of defence costs pending determination of the insurance coverage issues, but no agreement has been reached.

CASSELS BROCK
LAWYERS

These developments impact the current litigation timetable and, accordingly, we will be sending a short update to Justice McEwen in the form attached. We also propose to schedule a case conference on August 27, 2019 with Justice McEwen to discuss the effect of the coverage issue on these actions and the current litigation timetable.

In the interim and in the circumstances, we also write to advise that we will not be in a position to meet the August 23, 2019 deadline for filing of any production motions.

Yours truly,

Wendy Berman
WB/iw
Encl.

cc: Richard Swan and Jason Berall, *Bennett Jones LLP*
Harry Underwood, Andrew Faith, and Jeffrey Haylock, *Polley Faith LLP*
Peter J. Osborne and Matthew B. Lerner, *Lenczner Slaghght Royce Smith Griffin LLP*

TAB H

This is Exhibit "H" referred to in the Affidavit of Donald Campbell Ross sworn August ..26.., 2019

Commissioner for Taking Affidavits (or as may be)

CASSELS BROCK
LAWYERS

August 8, 2019

BY E-MAIL

wberman@casselsbrock.com
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The Honourable Justice Thomas J. McEwen
Superior Court of Justice
Commercial List Office
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Toronto, ON M5G 1R7

Dear Mr. Justice McEwen:

Re: FTI Consulting Canada Inc. v. ESL Investments Inc. *et al.*
Court File No. CV-18-00611219-00CL

Morneau Shepell Ltd. v. ESL Investments Inc. *et al*.
Court File No. CV-18-00611217-00CL

Sears Canada Inc. v. ESL Investments Inc. *et al.*
Court File No. CV-18-00611214-00CL

1291079 Ontario Limited v. Sears Canada Inc. *et al.*
Court File No. CV-19-617792-00CL

We are counsel to William Harker, William Crowley, Douglas Campbell, E.J. Bird, James McBurney, and Donald Ross, defendants in the above-noted actions (the "Former Directors"). We are writing to provide a brief update and to request that a further case conference be scheduled on August 27, 2019.

As we previously informed you, coverage under the 2015-2016 directors' and officers' policy issued to Sears Holdings Corporation (the "D&O Policy") was denied by the first excess insurer, QBE Insurance Corporation. Our clients engaged Canadian coverage counsel, Jim Doris of Tyr LLP, and commenced an application before the Superior Court of Justice (Commercial List) returnable on August 27, 2019 seeking, among other things, declaratory relief for coverage.

We have recently been advised by the primary insurer, XL Speciality Insurance Company, that coverage under the primary layer of the D&O Policy has been completely exhausted and, accordingly, no further defence cost funding is available. In addition, significant outstanding legal costs incurred by the Former Directors remain unpaid with no further funding available under the D&O Policy. The Former Directors are attempting to reach an agreement with the insurers for interim funding of defence costs pending determination of the insurance coverage issues, but no agreement has been reached.

CASSELS BROCK
LAWYERS

These developments impact the current litigation timetable and, accordingly, we are writing to request a case conference before you on August 27, 2019 or any alternate date convenient to all parties and the Court.

We estimate that such case conference will require approximately 30 minutes.

Yours truly,

Cassels Brock & Blackwell LLP

Wendy Berman
WB/iw

cc. Matthew Gotlieb and Andrew Winton, *Lax O'Sullivan Lisus Gottlieb LLP*
Orestes Pasparakis and Evan Cobb, *Norton Rose Fulbright Canada LLP*
Michael Barrack and Kiran Patel, *Blake, Cassels & Graydon LLP*
David Sterns, *Sotos LLP*
Lou Brzezinski, *Blaney McMurtry LLP*
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Harry Underwood, Andrew Faith, and Jeffrey Haylock, *Polley Faith LLP*
Peter J. Osborne and Matthew B. Lerner, *Lenczner Slahght Royce Smith Griffin LLP*

FTI CONSULTING CANADA INC. J. DOUGLAS CUNNINGHAM, Q.C. MORNEAU SHEPELL LTD. 1291079 ONTARIO LIMITED Plaintiffs	-and-	ESL INVESTMENTS INC *et al.* Defendants	Court File No.: CV-18-00611219-00CL Court File No. CV-18-00611214-00CL Court File No. CV-18-00611217-00CL Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD OF THE DEFENDANTS, BIRD, CAMPBELL, CROWLEY, HARKER, MCBURNEY AND ROSS

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