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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

MOTION RECORD OF THE MONITOR
(Transfer at Undervalue Proceeding Approval)
(returnable November 19, 2018)

November 5, 2018

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TO: THE SERVICE LIST

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Applicants

NOTICE OF MOTION
(Transfer at Undervalue Claim Approval)
(returnable November 19, 2018)

FTI Consulting Canada Inc., in its capacity as Court-appointed monitor (the "**Monitor**") in the proceedings of the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") will make a motion to a Judge of the Ontario Superior Court of Justice (Commercial List), on Monday, November 19, 2018, at 2:00 p.m. or as soon after that time as the motion can be heard, at the courthouse located at 330 University Avenue, Toronto, Ontario.

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

THE MOTION IS FOR:

1 an Order, substantially in the form included in the Motion Record (the "**TUV Claims Order**"):

(a) authorizing and empowering the Monitor to:

(i) commence and continue proceedings under Section 96 of the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, c. B-3, as amended (the "**BIA**"), as incorporated into the CCAA under Section 36.1 against ESL Investments Inc. and its affiliates (collectively, "**ESL**"), Edward Lampert ("**Lampert**"), and William Crowley and William Harker (both former directors of Sears Canada Inc., the "**Connected Directors**", and such proceedings, the "**Transfer at Undervalue Proceedings**") relating to the dividend paid to shareholders of Sears Canada Inc. ("**SCI**") on December 6, 2013 in the amount of approximately $509 million (the "**2013 Dividend**");

(ii) lift the stay of proceedings for the limited purpose of pursuing the Transfer at Undervalue Proceedings against the Connected Directors; and

(iii) establish an opt-out mechanism from funding and recovering from the Transfer at Undervalue Proceedings and related claims for unsecured creditors of SCI; and

(b) establish a set-off between recoveries received from any current and former directors and officers of SCI pursuant to the Transfer at Undervalue Proceedings and any distributions that would have been payable to such directors and officers from the estate of the Applicants on account of such directors' and officers' valid indemnity claims, if any, against the Applicants; and

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

THE GROUNDS FOR THE MOTION ARE:

Background

1 On June 22, 2017, the Applicants in these proceedings sought and obtained an initial order (as amended and restated on July 13, 2017, the "**Initial Order**") under the CCAA;

2 The Initial Order, among other things, appointed FTI Consulting Canada Inc. as Monitor of the Applicants;

3 Following its appointment, the Monitor commenced a review of certain material transactions, payments and dividends entered into, made or declared by the Applicants in the period prior to the Initial Order;

4 The Monitor identified the following transactions of interest:

(a) the dividend paid to SCI shareholders on December 31, 2012 in the amount of approximately $102 million (the "**2012 Dividend**");

(b) the dividend paid to SCI shareholders on December 6, 2013 in the amount of approximately $509 million (a majority of which appears to have been received directly or indirectly by Sears Holdings Corporation, Lampert, and ESL (the "**2013 Dividend**"); and

(c) the surrender by SCI of its exclusive right to use the Craftsman trademark in Canada in connection with the sale by Sears Holdings Corporation of the Craftsman business to Stanley Black & Decker in March 2017 (the "**Craftsman Transaction**").

5 While the Monitor initially identified concerns regarding the 2012 Dividend and the Craftsman Transaction, the Monitor determined that it should not proceed with any claim in respect of the 2012 Dividend or the Craftsman Transaction.

6 With respect to the 2013 Dividend, the Monitor has identified material unresolved concerns that lead to the conclusion that remedies should be sought in connection with this transaction.

7 On March 2, 2018, the Court issued an order (as amended on April 26, 2018) appointing Lax O'Sullivan Lisus Gottlieb LLP as litigation investigator (the "**Litigation Investigator**") to identify and report on certain potential rights and claims of the Applicants and/or creditors of the Applicants.

Transfer at Undervalue Proceedings

8 Based upon information available to the Monitor at this time, the Monitor believes it is appropriate for the Monitor to advance a claim against Lampert, ESL and the Connected Directors, that the 2013 Dividend was a transfer at undervalue that should be remedied under Section 96 of the BIA, as incorporated into the CCAA under Section 36.1.

9 In the Monitor's view, the following must be proven in order for a claim under Section 96 of the BIA and Section 36.1 of the CCAA to succeed in connection with the 2013 Dividend:

(a) in addition to Section 101 of the BIA, Section 96 of the BIA provides a second avenue to challenge a dividend as a reviewable transaction under the BIA;

(b) the 2013 Dividend meets the criteria of a transfer at undervalue under the BIA;

(c) some of the parties receiving the 2013 Dividend were not dealing at arm's length with SCI;

(d) SCI was either insolvent at the time of the 2013 Dividend, rendered insolvent by the 2013 Dividend or SCI intended to defraud, defeat or delay creditors in connection with the 2013 Dividend; and

(e) in the case of the Connected Directors, such directors were privy to the transfer as described above.

10 The Monitor believes there is sufficient information to draw a preliminary conclusion, subject to review of further evidence as it becomes available, that these matters can be proven and that the transfer at undervalue claim should be considered by the Court on a full record.

11 In the first report of the Litigation Investigator dated November 5, 2018, the Litigation Investigator recommended that the Monitor pursue the Transfer at Undervalue Proceedings.

12 The Litigation Investigator also recommends proceeding with claims relating to the 2013 Dividend that overlap with Monitor's proposed claim.

Opt-Out Mechanism

13 The Monitor and the Litigation Investigator propose an opt-out mechanism that would segregate costs directly related to the litigation of the Monitor's claim and the Litigation Investigator's recommended claim from the normal CCAA administration costs to ensure that any creditors of SCI who neither wish to fund nor recover from any claims relating to the 2013 Dividend can preserve the unsecured recoveries they would receive if this litigation were not pursued.

14 The opt-out mechanism will protect the interests of creditors who both hold material claims and do not wish to participate in the cost or benefit of such litigation.

15 The Monitor proposes that Employee Representative Counsel and Pension Representative Counsel be authorized to exercise opt-out rights on behalf of the parties they represent both for efficiency and because the question of whether to opt-out is in large part a determination of a party's view of the legal merits of the proposed claims, for which Employee Representative Counsel and Pension Representative Counsel are well positioned to advise on behalf of their clients.

16 Morneau Shepell Limited, as administrator of the Sears Canada Pension Plan, is proposed as the appropriate party to elect whether to opt-out in connection with the claim arising from the wind-up deficit in the defined benefit component of the Sears Canada Pension Plan.

Costs of the Transfer at Undervalue Proceedings

17 In the Monitor's view, the proposed funding reserves associated with the Monitor's and Litigation Investigator's recommended claims regarding the 2013 Dividend are reasonable in view of the scope of the matters to be investigated and the size of the claims being asserted and the need to ensure at this time that the amount of litigation funding is sufficient to cover potential unforeseen contingencies.

18 The Monitor will review on an ongoing basis the expenditure of this proposed funding and will ensure that surplus funding that may remain at the completion of the litigation process would be returned to the estate.

Director and Officer Indemnity Claims

19 In order to preserve the indemnity rights of directors and officers of SCI, while at the same time not requiring the estate of the Applicants to reserve funds to satisfy such potential indemnity claims in the future that may arise as a result of the Monitor's claims, any recoveries

from such directors and officers of SCI as a result of such claims will be net of any unsecured distributions that would have been payable to such directors and officers from the estate of the Applicants on account of such directors' and officers' corresponding indemnity claims.

Other Grounds

20 The provisions of the CCAA, including section 11 thereof, and the inherent and equitable jurisdiction of this Court;

21 Rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, as amended; and

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

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

1 The Twenty-Seventh Report of the Monitor;

2 The First Report of the Litigation Investigator, dated November 5, 2018; and

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

November 5, 2018

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as Court-appointed Monitor

TO: **THE SERVICE LIST**

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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., et al.

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Proceeding commenced at TORONTO

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TAB 2

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

SEARS CANADA INC.,
AND RELATED APPLICANTS

TWENTY-SEVENTH REPORT OF FTI CONSULTING CANADA INC., AS MONITOR

November 5, 2018

Contents

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APPLICANTS

TWENTY-SEVENTH REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR

A. INTRODUCTION

1. On June 22, 2017, Sears Canada Inc. ("**Sears Canada**" or "**SCI**") and a number of its operating subsidiaries (collectively, with Sears Canada, the "**Applicants**") sought and obtained an initial order (as amended and restated on July 13, 2017, the "**Initial Order**"), under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The relief granted pursuant to the Initial Order was also extended to Sears Connect, a partnership forming part of the operations of the Applicants (and together with the Applicants, the "**Sears Canada Entities**"). The proceedings commenced under the CCAA by the Applicants are referred to herein as the "**CCAA Proceedings**".

2. The Initial Order, among other things:

   (a) appointed FTI Consulting Canada Inc. as monitor of the Sears Canada Entities (the "**Monitor**") in the CCAA Proceedings;

   (b) granted an initial stay of proceedings against the Sears Canada Entities until July 22, 2017; and

   (c) scheduled a comeback motion for July 13, 2017 (the "**Comeback Motion**").

3. Following the Comeback Motion, the Court extended the Stay Period. In addition, the following orders were issued:

   (a) an order setting out the terms of the appointment of Ursel Phillips Fellows Hopkinson LLP as representative counsel for the non-unionized active and former employees of the Sears Canada Entities ("**Employee Representative Counsel**");

   (b) an order setting out the terms of the appointment of Koskie Minsky LLP as representative counsel to the non-unionized retirees and non-unionized active and former employees of the Sears Canada Entities with respect to pension and post-employment benefit matters ("**Pension Representative Counsel**");

   (c) an order authorizing the eventual suspension of special payments under the Sears Canada Pension Plan, certain payments in connection with supplemental pension plans and certain payments under post-retirement benefit plans pursuant to a term sheet agreed to by the Ontario Superintendent of Financial Services, as Administrator of the Pension Benefits Guarantee Fund (the "**Superintendent**"), Employee Representative Counsel, Pension Representative Counsel, each of their respective representatives, and the Sears Canada Entities; and

   (d) an order approving a sale and investor solicitation process (the "**SISP**") to solicit interest in potential transactions, including investment and liquidation proposals, involving the business, property, assets and/or leases of the Applicants.

4. On July 18, 2017, the Court issued an order approving an agreement and a process for the liquidation of inventory and FF&E at certain initial closing Sears Canada locations, which liquidation process is now completed.

5. On October 13, 2017, the Court issued, among other orders, an order approving an agreement and a process (the "**Second Liquidation Process**") for the liquidation of the inventory and FF&E at all remaining Sears Canada retail locations, which liquidation commenced shortly thereafter and is now completed.

6. On December 8, 2017, the Court issued an Order (the "**Claims Procedure Order**") approving a claims process for the identification, determination and adjudication of claims of creditors against the Sears Canada Entities and their Officers and Directors.

7. On February 22, 2018, the Court issued an Employee and Retiree Claims Procedure Order (the "**E&R Claims Procedure Order**" and, together with the Claims Procedure Order, the "**Claims Procedure Orders**") approving a process for the identification, determination and adjudication of claims of employees and retirees of the Sears Canada Entities.

8. On March 2, 2018, the Court issued an Order appointing Lax O'Sullivan Lisus Gottlieb LLP as litigation investigator (the "**Litigation Investigator**") to identify and report on certain potential rights and claims of the Sears Canada Entities and/or creditors of the Sears Canada Entities. The order was amended on April 26, 2018 (the "**LI Order**").

9. The liquidation of assets at Sears Canada's retail locations is now completed, all retail locations are closed, and leases in respect of such locations have been disclaimed or surrendered back to the landlord. The major assets of the Sears Canada Entities that remain to be realized upon are the Applicants' remaining owned real estate assets.

10. In connection with the CCAA Proceedings, the Monitor has provided twenty-six reports and fifteen supplemental reports (collectively, the "**Prior Reports**"), and prior to its appointment as Monitor, FTI also provided to this Court a pre-filing report of the proposed Monitor dated June 22, 2017 (the "**Pre-Filing Report**"). The Pre-Filing Report, the Prior Reports and other Court-filed documents and notices in these CCAA

Proceedings are available on the Monitor's website at cfcanada.fticonsulting.com/searscanada/ (the "**Monitor's Website**").

B. PURPOSE

11. The purpose of this twenty-seventh report of the Monitor (the "**Twenty-Seventh Report**") is to provide the Court with information regarding motions:

    (a) by the Monitor for, among other things,

        (i) authorization and direction to proceed, pursuant to Section 36.1 of the CCAA, to issue and pursue a claim under Section 96 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") relating to the 2013 Dividend (as defined below);

        (ii) authorization and direction to take certain ancillary steps in connection therewith

        ((i) and (ii), collectively, the "**TUV Claim Motion**"); and

    (b) by the Litigation Investigator for, among other things, an order authorizing the appointment of a litigation trustee and counsel to pursue the claims recommended in the First Report of the Litigation Investigator, dated November 5, 2018 (the "**LI Motion**").

12. The TUV Claim Motion does not seek any determination of liability of any party for claims under Section 96 of the BIA. The TUV Claim Motion seeks only approval for the investment of further time and estate resources to commence and pursue these claims. This Twenty-Seventh Report does not include a summary of all evidence and arguments that would be relevant to these claims if the Monitor was authorized to pursue them.

13. A copy of the Monitor's draft statement of claim in connection with the 2013 Dividend is attached hereto as **Appendix "A"**.

C. TERMS OF REFERENCE

14. In preparing this Twenty-Seventh Report, the Monitor has relied upon audited and unaudited financial information of the Sears Canada Entities, the Sears Canada Entities' books and records, certain financial information and forecasts prepared by the Sears Canada Entities and discussions and correspondence with, among others, the senior management ("**Management**") of, and advisors to, the Sears Canada Entities (collectively, the "**Information**").

15. Except as otherwise described in this Twenty- Seventh Report:

    (a) the Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the *Chartered Professional Accountants of Canada Handbook*; and

    (b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Twenty- Seventh Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook.*

16. Future-oriented financial information reported in or relied on in preparing this Twenty-Seventh Report is based on Management's assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.

17. The Monitor has prepared this Twenty-Seventh Report in connection with the TUV Claim Motion and the LI Motion. The Twenty-Seventh Report should not be relied on for any other purpose.

18. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

19. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the following documents filed as part of the CCAA Proceedings: (i) the affidavits of Mr. Billy Wong, the former Chief Financial Officer of Sears Canada; (ii) the affidavit of Ms.

Becky Penrice, the former Executive Vice-President and Chief Operating Officer of Sears Canada; (iii) the affidavits of Mr. Philip Mohtadi, General Counsel and Corporate Secretary of Sears Canada; (iv) the Prior Reports; and (v) the First Report of the Litigation Investigator, dated November 5, 2018.

D. MONITOR'S INVESTIGATION OF TRANSACTIONS OF INTEREST

20. As described in the Eleventh Report of the Monitor, dated January 15, 2018, following its appointment, the Monitor commenced a review of certain material transactions, payments and dividends entered into, made or declared by the Sears Canada Entities in the period prior to their filing for protection under the CCAA. The review focused primarily on potential preference transactions and transfers at undervalue pursuant to Sections 95 and 96 of the BIA.

21. The Monitor identified the following Transactions of Interest:

(a) the dividend paid to Sears Canada shareholders on December 31, 2012 in the amount of approximately $102 million (the "**2012 Dividend**");

(b) the dividend paid to Sears Canada shareholders on December 6, 2013 in the amount of approximately $509 million (the "**2013 Dividend**" and, together with the 2012 Dividend, the "**Dividends**"); and

(c) the surrender by Sears Canada of its exclusive right to use the Craftsman trademark in Canada in connection with the sale by Sears Holdings Corporation of the Craftsman business to Stanley Black & Decker in March 2017 (the "**Craftsman Transaction**").

22. The Monitor received over 100,000 documents and files from Sears Canada and other associated parties from the time periods relevant to these transactions and has undertaken a targeted review of these documents.

E. MONITOR'S FINDINGS REGARDING THE CRAFTSMAN TRANSACTION

23. Sears Canada was a party to a licence agreement with Sears Holdings Corporation ("**Sears US**") entered into in 1987 ("**License Agreement**"). The License Agreement provided Sears Canada the right to use trademarks owned by Sears US.

24. On February 28, 2017, Sears Canada's board was informed that Sears US was selling its Craftsman business to Stanley, Black & Decker ("**SBD**"). The transaction would require the termination of the existing license rights held by Sears Canada with respect to the Craftsman trademarks.

25. Ultimately, Sears Canada agreed to terminate its rights to the Craftsman trademarks under the License Agreement, facilitating the sale to SBD. Sears Canada did not receive any portion of the consideration received by Sears US under the sale to SBD. Sears Canada and SBD entered into a replacement license agreement, providing Sears Canada with a royalty free license to these trademarks for a 15 year period, with a royalty-based license thereafter.

26. Following a detailed review of the Craftsman Transaction, the process followed by Sears Canada leading to the Craftsman Transaction, the advice received from Sears Canada's professional advisors, and the circumstances surrounding the Craftsman Transaction, the Monitor has concluded that the agreement by Sears Canada to relinquish its license rights appears to have been an arm's length negotiated transaction. The outcome of the transaction was the result of the relative bargaining position of Sears Canada, Sears US and SBD. Sears Canada was not reasonably in a position to insist that it receive any portion of the consideration paid to Sears US under the Craftsman Transaction. The royalty free license offered by SBD provided Sears Canada with sufficient ongoing license rights at no cost. In addition, if Sears Canada refused to cooperate in this transaction, Sears US had agreed with SBD to rely upon certain unilateral termination rights under the License Agreement, which would have affected all of Sears Canada's licensed trademark rights and placed Sears Canada in a less favourable position than was available under the Craftsman Transaction. As a result, this transaction did not require further review.

F. MONITOR'S FINDINGS REGARDING 2012 DIVIDEND

27. The relevant facts associated with the 2012 Dividend will be discussed in greater detail below in the section of this Twenty-Seventh Report on the 2013 Dividend.

28. Similar to the 2013 Dividend, the Monitor has identified concerns regarding the process followed to approve and pay the 2012 Dividend. However, based upon its review of the facts as applied to the relevant law, the Monitor has determined that the Monitor should not proceed with any claim in respect of the 2012 Dividend due to (i) the specific tests that the Monitor would need to satisfy under the relevant provisions of the BIA and (ii) the challenges in satisfying those tests at this time in view of available evidence of the financial position and intentions of Sears Canada in 2012.

G. MONITOR'S FINDINGS REGARDING THE 2013 DIVIDEND

29. The remainder of this Twenty-Seventh Report will describe the Monitor's views on the 2013 Dividend and the Monitor's request to pursue remedies in connection with the 2013 Dividend.

Process to Approve the 2013 Dividend

30. The Monitor has identified material concerns regarding the process followed by Sears Canada to declare and pay the 2013 Dividend.

31. Sears Canada declared and paid dividends twice in 2010 ("**2010 Dividends**"). The Monitor considered the 2010 Dividends to obtain background information on Sears Canada's past approval processes when declaring dividends and for comparison against the process undertaken by the board and management in respect of the 2012 Dividend and 2013 Dividend.

32. The process followed by the Sears Canada board to approve the 2010 Dividends appears to have been robust. In 2010, Sears Canada's net operating income was positive. Management presentations were delivered to the board well in advance of the approval and payment of these dividends. Those presentations set out multiple options to fund the payment of these dividends as well as other options to return value to shareholders. A

calculation of the excess cash that would remain following implementation of each such option was also provided to the board. Independent directors (being directors without a material connection to significant existing shareholders) met separately with external independent counsel to review and discuss the potential dividends. Ultimately, a dividend of approximately $376.7 million was approved by the board of directors on May 18, 2010 and was paid on June 4, 2010. A second dividend of approximately $376.7 million was approved on September 9, 2010 and paid on September 24, 2010 and the approval process for that dividend was equally thorough.

33. The Monitor's review shows that, in contrast to the 2010 Dividend, the board and management devoted significantly less time and analysis to the declaration and payment of the 2012 and 2013 Dividends.

34. The first information the Monitor has identified as being delivered to the board of Sears Canada in connection with the 2012 Dividend was delivered on December 12, 2012, in the form of a five page presentation (excluding appendices) relating to the 2012 Dividend. The presentation forecasted cash on hand at December 30, 2012 in the amount of $430 million. A 'downside' scenario showed negative excess cash for strategic uses forecasted for 2013. The presentation did not specifically consider the impact of the 2012 Dividend on creditors or Sears Canada's apparently weaker liquidity position relative to 2010. The presentation appears to have been sent to the Board at 11:56 am on December 12, 2012, in respect of a telephone meeting which took place from 2:00 pm to 3:00 pm later that day. The 2012 Dividend was declared at that teleconference board meeting and paid in an aggregate amount of approximately $102 million on December 31, 2012. The then CFO of Sears Canada resigned on January 24, 2013.

35. The information available to the Monitor indicates the process to approve the 2013 Dividend was more limited. On November 18 and 19, 2013, the Sears Canada board met in New York at the offices of Sears US's counsel. At that meeting, the Sears Canada board approved the 2013 Dividend of approximately $509 million in the aggregate, which was paid on December 6, 2013. The board materials (including the agenda and management presentation) provided for this meeting make no mention of any dividend

payment or the effect it would have on Sears Canada's liquidity and operations going forward. The Monitor has requested but not received or identified any evidence of a separate meeting or prior discussion amongst the independent directors (being those directors with no association with the major shareholders of Sears Canada). Email correspondence among senior management in Sears Canada's finance division show that at least some financial analysis was undertaken at the management level in respect of the 2013 Dividend. This analysis appears to have been completed the morning of November 18, 2013. The Monitor has not identified any correspondence through which this analysis was delivered to the board. The minutes do not make reference to any management presentation. The 2013 Dividend was approved by the full board (including independent and non-independent directors).

Significant Shareholders of Sears Canada

36. Publicly available information indicates that ESL Investments Inc., or its affiliates (collectively, "**ESL**"), Edward Lampert ("**Lampert**") and Sears US were shareholders of Sears Canada at the time of the 2013 Dividend. When the 2013 Dividend was *declared*, public disclosures indicate Sears US held just over 50% of the common shares of Sears Canada and ESL and Lampert held approximately 17% and 10% of the common shares of Sears Canada, respectively. Publicly available disclosures suggest that Lampert is the controlling shareholder of ESL and that Lampert and ESL held over 50% of the shares of Sears US at the time the 2013 Dividend was declared.

37. Before the 2013 Dividend was *paid*, the shareholdings of ESL and Lampert in Sears US dropped to approximately 48%.

38. At the time of the 2013 Dividend, two of eight directors and one officer of Sears Canada were former officers of Sears US and / or ESL.

39. Based upon a media review at and around the time of the 2013 Dividend declaration and payment, ESL appears to have had an urgent liquidity need at that time to satisfy redemption requests by clients of certain of its funds. Media reports indicate that these

redemptions were paid partly in cash and partly in shares of Sears US. An example of such a media report is attached hereto as **Appendix "B"**.

40. The evidence reviewed by the Monitor indicates that Lampert and individual directors of Sears Canada who were connected with ESL and Lampert, being William Harker and William Crowley (the "**Connected Directors**"), significantly influenced the determination to monetize assets to fund the 2013 Dividend and thereafter to declare and pay the 2013 Dividend.

Financial Circumstances of Sears Canada in 2013

41. The Monitor has considered the solvency of Sears Canada at the time of the 2013 Dividend. Based upon information available to the Monitor from public sources and from Sears Canada, the Monitor considered the value of Sears Canada from a going concern perspective and from a liquidation perspective.

42. The Monitor is not able to conclude that as of the date of the 2013 Dividend, Sears Canada was an insolvent person, as defined in the BIA.

43. A conclusion that Sears Canada's property was not sufficient to enable payment of all of its liabilities as of December 2013 if the assets of the business were immediately sold or liquidated at that time, would require assumptions as to the net value of real estate holdings at that time. Under certain real estate value assumptions Sears Canada would have been insolvent and under other alternative value assumptions Sears Canada would not have been insolvent. However, in the Monitor's view, further analysis to develop such assumptions would not be justified in view of third party analyses of Sears Canada's real estate holdings at that time and the values ultimately received for this real estate and similar properties owned by other competitors.

44. From a cash flow perspective, Sears Canada continued to operate for several years after the 2013 Dividend. Accordingly, one could not reasonably conclude that Sears Canada had ceased paying or ceased to be able to pay its obligations as they were coming due at the time of, or as a result of, the 2013 Dividend.

45. As will be discussed further below, while the Monitor cannot conclude that Sears Canada was insolvent at the time of the 2013 Dividend, the Monitor does believe that the indications of a business facing severe and likely irreversible challenges were present at the time of the 2013 Dividend.

Relevant Law

46. Based upon information available to the Monitor at this time, the Monitor believes it is appropriate for the Monitor to advance a claim against Lampert and ESL that the portion of the 2013 Dividend they received was a transfer at undervalue that should be remedied under Section 96 of the BIA, as incorporated into the CCAA under Section 36.1. The Monitor believes it is appropriate to also extend this claim to the Connected Directors, as parties privy to the transaction.

47. While the Monitor also believes a corresponding claim could be advanced against Sears US, the Monitor is not recommending or seeking authority to advance such claim at this time in view of the recent filing by Sears US for protection under Chapter 11 of the United States Bankruptcy Code and the stay of proceedings triggered by that filing. The Monitor is currently considering next steps regarding this claim against Sears US and will await further information from the Chapter 11 proceedings.

48. The relevant portions of Section 96 of the BIA, with required modifications pursuant to Section 36.1 of the CCAA are as follows:

> **96** (1) On application by the [Monitor], a court may declare that a transfer at undervalue is void as against … the [Monitor] … or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> …
>
> (b) the party was not dealing at arm's length with the debtor and
>
> > (i) the transfer occurred during the period that begins on the day that is one year before the [day on which proceedings commence under the CCAA] and that ends on the [day on which proceedings commence under the CCAA], or

> (ii) the transfer occurred during the period that begins on the day that is five years before [day on which proceedings commence under the CCAA] and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
>
> (B) the debtor intended to defraud, defeat or delay a creditor.
>
> …
>
> (3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

49. A 'transfer at undervalue' is defined in section 2 of the BIA as:

> a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

50. A person is privy to a transfer at undervalue if they (i) did not deal at arm's length with any party to the transfer, and (ii) by reason of the transfer, directly or indirectly, received a benefit or caused a benefit to be received by another person.

51. In the Monitor's view, the following are key considerations for a claim under Section 96 of the BIA and Section 36.1 of the CCAA to succeed in connection with the 2013 Dividend:

(a) in addition to Section 101 of the BIA, Section 96 provides a second avenue to challenge a dividend as a reviewable transaction under the BIA;

(b) the 2013 Dividend meets the criteria of a transfer at undervalue;

(c) the parties receiving a portion of the 2013 Dividend were not dealing at arm's length with Sears Canada;

(d) Sears Canada was either insolvent at the time of the 2013 Dividend, rendered insolvent by the 2013 Dividend or Sears Canada intended to defraud, defeat or delay creditors in connection with the 2013 Dividend; and

(e) in the case of the Connected Directors, such directors were privy to the transfer as described above.

Section 101 of the BIA

52. Section 101 of the BIA (as modified by s. 36.1 of the CCAA) specifically addresses the payment of dividends within one year prior to the commencement of a CCAA proceeding. The Monitor has considered with its counsel whether Section 101 was intended to be the sole mechanism by which the Monitor could challenge a dividend payment under the BIA provisions.

53. The Monitor is of the view that there is a reasonable basis to conclude that Section 96 of the BIA can operate in combination with Section 101 of the BIA to remedy dividend transactions that adversely impact the assets of the estate available to creditors. The Monitor notes, however, that Canadian jurisprudence on this point is very limited. The only Canadian decision the Monitor has identified that deals directly with this point supports the conclusion that a dividend can be found to be a transfer at undervalue under a predecessor provision to Section 96 notwithstanding the concurrent operation of the predecessor provision to Section 101 of the BIA. The Monitor has identified no Canadian precedent addressing the application of Section 96 to the payment of shareholder dividends.

54. Section 101 addresses the payment of a shareholder dividend within one year before insolvency proceedings commence, unless the corporation or its shareholders can show that the corporation was not insolvent or rendered insolvent by the dividend payment. Section 96 provides additional remedies that can respond to transactions over a longer 'look-back' period if those transactions were engaged with non-arm's length parties while the debtor company was insolvent or with an intent to defraud, defeat or delay other creditors. The Monitor is of the view that, whereas Section 101 provides a

narrowly defined set of circumstances in which remedies for improper dividends will clearly be readily available, Section 96 can be interpreted to provide a broader set of protections for transactions, including dividends, where the facts, such as non-arm's length dealings, insolvency and/or intention to defraud, delay or defeat other creditors justify a remedy for the benefit of all creditors and to preserve the assets of the insolvent party's estate for the benefit of creditors.

2013 Dividend Meets the Criteria of a Transfer at Undervalue

55. A transfer at undervalue is (i) a disposition of property or provision of services; and (ii) for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

56. The 2013 Dividend resulted in the disposition of approximately $509 million in property value to shareholders.

57. Those shareholders who received the 2013 Dividend paid no direct consideration in return for that dividend. The Monitor recognizes that a dividend is, in substance, compensation for the use of the investment of shareholders. However, the Monitor also notes that, prior to a dividend being declared, a shareholder has no legally enforceable claim to any dividend funds and the debtor has no obligation to pay any such dividend funds. In receiving the dividend, a shareholder does not exchange or relinquish any valuable enforceable right it has vis-à-vis the corporation paying the dividend.

Non-Arm's Length Recipients of Dividends

58. Related parties are presumed, in the absence of evidence to the contrary, not to be dealing with each other at arm's length pursuant to Section 4 of the BIA. In the case of parties that were not related to each other at the time of the transaction, it is a question of fact whether they were dealing with each other at arm's length.

59. As noted above, the recipients of the 2013 Divided would have included Sears US, as a majority holder of the shares of Sears Canada at the time of the declaration of the 2013

Dividend, ESL or its affiliates, as a direct holder of 17% of the shares of Sears Canada at that time, and Lampert, as a holder of 10% of the shares of Sears Canada at that time. As a result of Lampert's apparent control of ESL, and ESL's and Lampert's apparent control of Sears US, Sears US, ESL and Lampert, collectively, held sufficient shares to have majority ownership, as a group, of Sears Canada at the time of the declaration of the 2013 Dividend. If it is accepted that these parties operated as a group, they would be related to Sears Canada and presumed (absent evidence to the contrary) to be non-arm's length in connection with the 2013 Dividend.

60. The appointment of directors and officers of Sears Canada with material links to ESL and Sears US provides further evidence of the relationships between these parties at the relevant times.

61. The Monitor believes ESL, Lampert and Sears US, collectively, did not deal at arm's length with Sears Canada at the relevant time based upon the foregoing information.

62. The Monitor has not identified any material information to rebut this conclusion.

Sears Canada's Insolvency or Intention to Defraud, Defeat or Delay Creditors

63. As noted above, it is not clear from the available information that Sears Canada was an insolvent person at the time of the 2013 Dividend, within the meaning set out under the BIA.

64. The Monitor believes there is sufficient information to draw a preliminary conclusion, subject to review of further evidence as it becomes available, that at the end of 2013, Sears Canada was paying significant dividends while, at the same time, proceeding along a path to inevitable insolvency. This information includes:

(a) Sears Canada's policy of monetizing key assets and making significant distributions to shareholders without investing in the growth or re-alignment of the business or satisfying its obligations to material creditors;

(b) Sears Canada's steadily declining financial performance including negative net profitability and cash flow; and

(c) Sears Canada's limited review, analysis and consideration of the effect of paying the 2013 Dividend upon its ability to satisfy its liabilities in the future, including the substantial pension wind-up obligations that Sears Canada had no plan to pay.

(a) Asset Monetization

65. Over 2012 and 2013, SCI engaged in several high-profile monetization transactions involving real estate assets in order to generate cash proceeds totalling in excess of $1 billion. These transactions included key retail assets and the cessation of operations at key retail locations, namely: Yorkdale Shopping Centre; Square One Mississauga; Toronto Eaton Centre, Sherway Gardens, Markville Shopping Centre, Masonville Place and Richmond Centre. Certain parties knowledgeable about the 2013 real estate monetizations advised the Monitor that the 2013 real estate transactions appear to have been undertaken on an expedited basis, which may have materially depressed the sale values received.

(b) Declining Financial Performance

66. In 2010, Sears Canada had an operating profit of $196.3 million.

67. 2010 was the last year Sears Canada generated a profit from operations. It experienced a steady decline in financial performance beginning in 2011. In 2011, it was operating at a loss of $50.9 million, and by 2013 the annual operating loss was $187.8 million.

68. The chart below illustrates the rapid deterioration of Sears Canada's financial condition immediately prior to and following the declaration of the Dividends:[1]

[1] Sears Canada Inc.'s Annual Audited Financial Statements from 2010 – 2016.

Year	Total Revenues ($ million)	Operating Profit (Loss) ($ millions)	Gross Margin Rate
2010	4,938.5	196.3	39.3%
2011	4,619.3	(50.9)	36.5%
2012	4,300.7	(82.9)	36.7%
2013	3,991.8	(187.8)	36.2%
2014	3,424.5	(407.3)	32.6%
2015	3,145.5	(298.3)	31.8%
2016	2,613.6	(422.4)	27.3%

69. Analyst reports suggest that the market did not attach any material value to Sears Canada's ongoing operations in 2012 and 2013, and it should have been clear that Sears Canada would continue to experience increasing operational losses as it sold off valuable key assets.

70. FTI's review of cash flow forecasts presented by Sears Canada in early 2014 draws a similar conclusion. Once the forecast was normalized by FTI for appropriate assumptions regarding the financial performance of the business going forward based upon past trends, including store closures, preliminary conclusions indicate that Sears Canada's operations could not reasonably have been expected to be cash flow positive from 2014 onward absent a turnaround plan accompanied by substantial investment in the business, which does not appear to have been in Sears Canada's plans. If then existing trends continued during and after 2014, Sears Canada would have reasonably projected exhausting its cash reserves by 2016 (absent additional inflows from asset sales or debt financing). Even after accounting for asset realizations, available normalized projections

indicate that based upon then existing trends, Sears Canada would have forecasted to have negative cash of $430 million by 2019.

71. In March of 2014, the Sears Canada board held a telephone meeting at which two further dividend scenarios were discussed in the amount of $1.50 per share and $2.50 per share. The process at this meeting was similar to the 2012 Dividend approval process as materials relating to these dividend scenarios were circulated less than one hour before the scheduled start time for the meeting. Sears Canada ultimately did not declare this dividend. Available evidence suggests this non-payment was the result of concerns about Sears Canada's financial position just three months after the 2013 Dividend was paid.

(c) Consideration of Impact on Creditors

72. From 2012 onward, Sears Canada appears to have been effectively undertaking a process of self-liquidation. The company appears to have moved quickly to monetize assets potentially at suboptimal values, which facilitated immediate payments to shareholders. In 2017, the liquidation was completed under the CCAA.

73. There is no evidence available to the Monitor at this time to show that Sears Canada considered in detail whether, after paying the dividends to shareholders in 2013, sufficient funds would remain to satisfy all liabilities. It is now clear that there would have been no reasonable basis to conclude that sufficient value would be available to pay creditors after paying this dividend, continuing to generate significant losses in future years, and after the process of liquidating all assets was complete. Monetizing assets and distributing proceeds to shareholders by means of the 2013 Dividend shifted risk to creditors and away from shareholders. It appears that payments to creditors may have been delayed for the benefit of shareholders and the 2013 Dividend could reasonably have been known to have a material and adverse impact on Sears Canada's ability to pay creditors in the future.

74. When considering the intention of Sears Canada regarding the 2013 Dividend, the Monitor believes the following factors are most relevant:

(a) Significant portions of the dividends were paid to non-arm's length parties;

(b) certain of these non-arm's length parties were facing their own liquidity pressures in the form of redemption requests from investors, which may have created an urgent need for the cash provided by the 2013 Dividend;

(c) the real estate monetization transactions were undertaken at the direction of Lampert who was not a duly authorized representative of Sears Canada;

(d) the 2013 Dividend appears to have been undertaken with undue haste and without the level of board process that one would have expected, and that was followed when the 2010 dividend was approved;

(e) The 2013 Dividend was paid in the face of worsening financial results, significant outstanding debts, including with respect to pensions, and outstanding litigation. The Monitor notes that in a letter dated December 3, 2013, counsel to the plaintiff in a class proceeding commenced on behalf of certain Sears Hometown dealers raised the possibility that the proposed payment of the 2013 Dividend could leave Sears Canada without sufficient reserves to satisfy any judgment obtained on behalf of the Sears Hometown dealers against Sears Canada. Similar concerns regarding potential future dividends were raised by the Sears Canada Retiree Association in a letter dated January 30, 2013;

(f) FTI's preliminary conclusions indicate that Sears Canada's operations could not reasonably have been expected to generate positive cash from 2014 onward absent a turn-around plan accompanied by substantial investment in the business, which was not planned; and

(g) if existing trends continued during and after 2014, Sears Canada would have reasonably projected exhausting its cash reserves by 2016 (absent additional inflows from asset sales or debt financing). Even after accounting for asset realizations, FTI's projections indicate that based upon then existing trends, Sears Canada would have been forecast to have negative cash of $430 million by 2019. Recent public statements by the then CEO of SCI in 2013 indicate that he was

denied the necessary capital to invest in initiatives to improve SCI's operational performance (including, among other things, a large-scale store refresh project).

The Connected Directors were privy to the 2013 Dividend

75. Both of the Connected Directors had close links to ESL and Lampert. Both were former long term officers of ESL Investments Inc. These parties, as a result of their positions, had significant influence over the decisions to monetize real estate and pay the 2013 Dividend. The Monitor has identified evidence that these parties played a material role in these transactions and may have caused the 2013 Dividend to be received by ESL, Lampert and Sears US.

H. MONITOR'S RECOMMENDATION ON TUV CLAIM MOTION

76. The Monitor is not in a position at this time to conclude with certainty that the 2013 Dividend is a transfer at undervalue that must be reversed. However, based upon the facts known to the Monitor at this time, the Monitor believes there is a reasonable basis for the Court to consider further, on a full record, whether:

(a) Section 96 is available to remedy the payment of a dividend provided all requirements of that section are satisfied;

(b) the 2013 Dividend meets the criteria of a transfer at undervalue;

(c) ESL and Lampert received a significant portion of the 2013 Dividend and were not dealing at arm's length with Sears Canada;

(d) Sears Canada intended to defraud, defeat or delay creditors through payment of the 2013 Dividend and recklessly disregarded the fact that the payment of the 2013 Dividend would defraud, defeat or delay creditors; and

(e) the Connected Directors were privy to the transaction.

77. The 2013 Dividend in an aggregate amount exceeding $500 million (a majority of which appears to have been received directly or indirectly by Sears US, Lampert and ESL) is a

very material matter for the creditors of Sears Canada. Recovery of even a portion of this amount from Lampert, ESL or the Connected Directors would materially increase the recoveries of creditors who, at this time, are projected to receive minimal or no recoveries from the Sears Canada estate.

78. The Monitor believes these arguments should be considered by the Court on a full record to determine if a claim under Section 96 of the BIA will succeed. The Monitor will provide a further update at a later date regarding any similar claim that it may seek to pursue against Sears US after further review of the implications of the Sears US insolvency and Chapter 11 proceedings.

I. MONITOR'S RECOMMENDATION ON LI MOTION

79. The Monitor and its counsel have reviewed the First Report of the Litigation Investigator and have engaged in consultation with the Litigation Investigator regarding the LI Motion and the claims proposed to be pursued thereunder.

80. The Monitor believes the appointment of a Litigation Trustee as a court officer to direct litigation on behalf of the Sears Canada Entities is appropriate in the circumstances given the current status of the Sears Canada Entities, the fact that litigation recoveries will be solely for the benefit of creditors of the Sears Canada Entities, the limited remaining employees of the Sears Canada Entities, the likelihood that the remaining employees will eventually cease to be so employed, and the possible duration of any litigation. The Monitor believes the proposed Litigation Trustee has the experience and knowledge to be properly qualified for the position.

81. In the Monitor's view, the litigation protocol proposed by the Litigation Investigator is efficient and sensible due to the overlapping facts associated with the Monitor's proposed claim under Section 36.1 of the CCAA, the Litigation Trustee's proposed claims and the other claims of third parties described in the Litigation Investigator's First Report, all of which relate to the 2013 Dividend.

82. The Monitor does not, in this Twenty-Seventh Report, provide a recommendation on the merits or likelihood of success of the claims described in the First Report of the

Litigation Investigator. However, the Monitor does believe, consistent with the Monitor's position on the TUV Claim Motion, that there is a sufficient basis to justify these claims being considered by the Court on a full record.

J. DIRECTOR AND OFFICER INDEMNITY CLAIMS

83. The claims that the Monitor and the Litigation Investigator recommend pursuing in connection with the 2013 Dividend include claims against current and former directors and officers of Sears Canada (the "**Current and Former D&Os**").

84. Those Current and Former D&Os may have valid indemnity claims against Sears Canada to the extent that such Current and Former D&Os pay costs or damages in connection with these claims that are not covered by insurance.

85. In order to preserve such Current and Former D&Os' indemnity rights while at the same time not requiring the estate to reserve funds to satisfy such potential indemnity claims in the future, the Monitor and the Litigation Investigator have agreed that any recoveries they receive from the Current and Former D&Os will be net of any distributions that would have been payable to these Current and Former D&Os from the estate on account of the Current and Former D&Os corresponding indemnity claims. Current and Former D&Os will effectively be paid their distributions on account of indemnity claims directly from the litigation proceeds that those Current and Former D&Os may contribute to the estate.

86. The Monitor recognizes that this proposal does not fully protect the Current and Former D&Os in a circumstance where the litigation is unsuccessful and the Current and Former D&Os have indemnity claims for legal costs. However, any reserve required to satisfy such an indemnity claim solely for legal costs is expected to be a manageable reserve amount.

K. COST OF PURSUING CLAIMS UNDER SECTION 96

87. As noted in the First Report of the Litigation Investigator, an aggregate amount of $12 million is proposed to be set aside from the estate of Sears Canada to fund all litigation

proposed to be commenced by the Litigation Trustee and the Monitor in connection with the 2013 Dividend. Any other third party claims will not be funded by Sears Canada.

88. The Monitor has reviewed the proposed amount of funding with the Litigation Investigator and believes the proposed amount of funding provides sufficient resources to diligently pursue this litigation. The Monitor notes that the proposed claims are expected to be both legally and factually complex and substantial resources will need to be allocated to all aspects of these claims. The proposed funding amount is intended to be a maximum amount that could be needed for the litigation. The Monitor and the Litigation Investigator have not budgeted for the full use of all available litigation funding. In many foreseeable circumstances, there will be significant surplus funds remaining after completion of the litigation. However, setting aside this amount now will ensure that this litigation process does not experience funding shortfalls in the future, when further access to funding may not be available, and clearly signals that the estate has ample resources to pursue these claims to the fullest extent possible in this case. The Monitor will review on an ongoing basis the expenditure of this proposed funding and will ensure that surplus funding that may remain at the completion of the litigation process would be returned to the estate.

89. The Monitor understands the Creditors' Committee established under the LI Order has also reviewed the proposed funding and is supportive of the funding to be provided for this litigation.

90. The Monitor recognizes that stakeholders may have differing views on the proposed litigation and believes an opt-out mechanism is an appropriate and practical approach to protect the interests of those stakeholders who are not in favour of pursuing the litigation. The opt-out mechanism proposed by the Monitor and the Litigation Investigator would segregate costs directly related to the litigation from the normal CCAA administration costs to ensure that any creditors of Sears Canada who neither wish to fund nor recover from any claims relating to the 2013 Dividend can preserve the unsecured recoveries they would receive if this litigation were not pursued. As part of this process, the Monitor and

its counsel would record their fees and disbursements in a manner that would permit any costs associated with this litigation to be separately identified going forward.

91. To implement the opt-out mechanism, the Monitor proposes to notify all known creditors with claims in excess of $5,000 of the opt-out process and will advise these creditors that if they wish to exercise this right to opt-out they must return a signed opt-out notice on or before sixty days following receipt of such notice from the Monitor. The Monitor proposes to establish a $5,000 threshold for efficiency and believes such a threshold is justified in view of the costs of delivering opt-out notices and the likely recoveries of creditors with claims of less than $5,000 (excluding possible litigation proceeds). A copy of the form of opt-out notice and creditor communication is attached hereto as **Appendix "C"**.

92. The Monitor proposes that Employee Representative Counsel and Pension Representative Counsel be authorized to exercise opt-out rights on behalf of the parties they represent both for efficiency and because the question of whether to opt-out is in large part a determination of a party's view of the legal merits of the proposed claims, for which Employee Representative Counsel and Pension Representative Counsel are well positioned to advise on behalf of their clients. The Monitor's proposed draft order also confirms that Morneau Shepell Limited, as administrator of the Sears Canada Pension Plan, is the party with authorization to elect whether to opt-out in connection with the claim arising from the wind-up deficit in the defined benefit component of the Sears Canada Pension Plan.

93. Set out below is an illustrative estimate of recoveries to unsecured creditors of SCI who elect to opt out of participation in the claims relating to the 2013 Dividend relative to the recoveries of unsecured creditors of SCI who do not opt out at various levels of litigation recovery and at various percentages of creditors electing to opt out. The recoveries of unsecured creditors of SCI who elect to opt-out are, in all cases, estimated to be 7.4%. The recoveries of unsecured creditors of SCI who do not elect to opt out are estimated to be in the range of 6.0% to 64.6% depending upon the level of recoveries from the litigation and the proportion of opt-out creditors as shown in the table below.

Opt out %	$0 Litigation Recovery		$50 Million Litigation Recovery		$150 Million Litigation Recovery		$500 Million Litigation Recovery	
	Opt-out Recovery %	Non-Opt-out Recovery %	Opt-out Recovery %	Non-Opt-out Recovery %	Opt-out Recovery %	Non-Opt-out Recovery %	Opt-out Recovery %	Non-Opt-out Recovery %
0%	-	6.9%	-	9.2%	-	13.9%	-	30.3%
10%	7.4%	6.8%	7.4%	9.4%	7.4%	14.6%	7.4%	32.8%
20%	7.4%	6.7%	7.4%	9.7%	7.4%	15.5%	7.4%	36.0%
30%	7.4%	6.6%	7.4%	10.0%	7.4%	16.7%	7.4%	40.1%
40%	7.4%	6.5%	7.4%	10.4%	7.4%	18.2%	7.4%	45.5%
50%	7.4%	6.3%	7.4%	11.0%	7.4%	20.4%	7.4%	53.2%
60%	7.4%	6.0%	7.4%	11.9%	7.4%	23.6%	7.4%	64.6%

94. This recovery analysis is based on current cash on hand and estimated cash flows until December 2018 and is used for illustrative purposes only. The recovery analysis does not reflect proceeds that would be available from future real estate transactions. The recovery analysis reflects a reserve of $10 million for any operating costs, professional fees and contingencies associated with the wind down of the estate after December 2018. The non-opt out analysis also reflects the litigation funding budget of $12 million. Claims have been valued based on the Notices of Revision / Disallowance sent and the Notices of Dispute received (and in the case of material claims for which Notices of Dispute have been received, the Monitor's view of a reasonable valuation thereof), and are subject to change as claims are adjudicated. The recovery analysis also assumes that the claim in respect of the wind-up deficiency against Sears Canada Entities is an unsecured claim valued at $650.5 million[2], out of which $624.5 million relates to Sears Canada.

95. The Monitor believes there is substantial creditor support for the pursuit of the Monitor's claim to recover amounts in connection with the 2013 Dividend. However, if the extent of any opt outs from participation in the litigation is sufficient to question the overall level of creditor support for this litigation, the Monitor may return to court for further direction regarding this litigation.

[2] For indicative purposes only.

The Monitor respectfully submits to the Court this, its Twenty-Seventh Report.

Dated this 5th day of November, 2018.

FTI Consulting Canada Inc.
in its capacity as Monitor of
the Sears Canada Entities

Paul Bishop
Senior Managing Director

Greg Watson
Senior Managing Director

APPENDIX "A"
MONITOR'S DRAFT STATEMENT OF CLAIM

Court File No.:

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

STATEMENT OF CLAIM

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

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

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

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

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

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

Date: November , 2018

Issued by _____
Local registrar

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CLAIM

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

(a) a declaration that the transfer of funds to the Defendants, ESL Investments Inc. (**ESL Investments**), ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, and Edward S. Lampert (**Lampert**), by means of a dividend of $5.00 per share paid by Sears on December 6, 2013 (the **2013 Dividend**):

(i) was a transfer at undervalue for the purposes of section 96 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3 (the **BIA**), as incorporated into the CCAA by section 36.1 thereof (the **Transfer at Undervalue**); and

(ii) is void as against the Monitor;

(b) an order that the Defendants, either as parties to the 2013 Dividend or as a privies thereto, or both, shall jointly and severally pay to Sears the full amount of the 2013 Dividend, being approximately $509 million in total;

(c) in the alternative, an order that the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall jointly and severally pay to Sears the portion of the 2013 Dividend received by the Defendants, collectively;

(d) in the further alternative, an order that each of the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall pay to Sears the amount of the 2013 Dividend that such Defendant received, or directly or indirectly benefitted from;

(e) pre and post-judgment interest in accordance with the *Courts of Justice Act*, RSO 1990, c. C.43; and

(f) costs of this action on a substantial indemnity basis.

The Parties

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

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

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

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

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

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

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

(a) Holdings beneficially owned 51,962,391 shares in Sears, representing approximately 51% of the outstanding shares.

(b) ESL beneficially owned 17,725,280 shares in Sears, representing approximately 17.4% of the outstanding shares, which were directly held as follows:

(i) ESL Partners, LP: 15,821,206 shares;

(ii) SPE I Partners, LP: 830,852 shares;

(iii) SPE Master I, LP: 1,068,522 shares;

(iv) ESL Institutional Partners, LP: 4,381 shares; and

(v) CRK Partners, LLC (an affiliate of ESL Investments, Inc. that was voluntarily cancelled effective June 1, 2018 and is not a party to these proceedings): 319 shares;

(c) Lampert owned 10,433,088 shares in Sears, representing approximately 10.2% of the outstanding shares; and

(d) Harker owned 4,604 shares in Sears.

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

Sears' Operational Decline

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

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

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

> Sears Canada is not a good retailer. Our business is broken: trading is awkward and inefficient, we lack product and merchandising focus and we are becoming irrelevant to customers while losing touch with our core.
>
> […]
>
> We lack many of the fundamental processes, structures and culture of a strong retailer. In short, we lack 'retail rhythm'. However, most of our challenges are self-induced, meaning we are in a position to fix them.

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

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

2013 Plan to Dispose of Real Estate Assets to Fund Dividends

14 By 2013, ESL Investments and Lampert had an immediate need for cash from Sears. ESL Investments had raised money from investors years earlier on terms that precluded these investors from redeeming their investment for a period of time. In 2013, this holding period had expired, investors were entitled to withdraw funds and ESL Investments faced significant redemptions.

15 In order to satisfy its redemption obligations, ESL and Lampert devised a plan to extract cash from Sears through (a) the disposition of its most valuable real estate assets, and (b) the payment of an extraordinary dividend for the benefit of ESL, Lampert and Holdings (collectively the **Monetization Plan**).

16 To give effect to the Monetization Plan, Lampert personally directed the disposition of Sears' real estate assets in 2013. Lampert provided specific instructions to Sears on the price sought by Sears for its dispositions. The Monitor specifically denies Lampert's public statement on February 11, 2018:

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

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

(a) Crowley had acted as President and Chief Operating Officer of ESL Investments from January 1999 to May 2012, Executive Vice-President and Chief Administrative Officer of Holdings from September 2005 to January 2011 and Chief Financial Officer of Holdings for periods in 2005-2007;

(b) Harker was an Executive Vice-President and General Counsel of ESL Investments from February 2011 to June 2012 and an officer of Holdings from September 2005 until August 2012, during which time he acted variously as General Counsel, Corporate Secretary and Senior Vice-President, among other roles;

(c) Bird was the Chief Financial Officer of ESL Investments from 1991 until 2002; and

(d) Stollenwerck was the President of the Real Estate Business Unit of Holdings from February 2008 to April 2018 and a Senior Vice President, Real Estate for Holdings from March 2005 to February 2008. Before joining Holdings, Stollenwerck had acted as Vice-President, Research at ESL Investments.

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

September 2013 Board Presentations

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

(a) sales continued to decline across Sears' business at a rate of 2.6% per year;

(b) based on year-to-date current trends (and without appropriately accounting for stores closed in connection with the Monetization Plan), Sears' projected EBITDA by 2016 would be negative $105 million; and

(c) Sears was struggling operationally: "Basics not fixed".

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

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

Continued Disposition of Real Estate Assets

22 In accordance with the Monetization Plan, Sears pursued an agreement with Cadillac Fairview Corporation Limited (**Cadillac Fairview**) to terminate five additional high-value leases (Toronto Eaton Centre, Sherway Gardens, Markville Shopping Centre, Masonville Place and Richmond Centre) (the **Cadillac Terminations**).

23 Lampert directed the negotiating strategy in connection with the Cadillac Terminations with a view to ensuring a dividend of the proceeds before the end of 2013. Crowley and Stollenwerck negotiated directly with Cadillac Fairview, including with respect to the final price of $400 million.

24 On October 28, 2013, the Board approved the Cadillac Terminations. The Board was not advised of the role that Lampert, Crowley or Stollenwerk had played in negotiating the Cadillac Terminations. The Cadillac Terminations closed on November 12, 2013.

25 In the same period, Sears and Stollenwerck negotiated the sale of Sears' 50% interest in eight properties jointly owned with The Westcliff Group of Companies. Sears' 50% interest was sold to Montez Income Properties Corporation in exchange for approximately $315 million (the **Montez Sale**).

26 The Sears Board approved the Montez Sale on November 8, 2013. The approval was made by written resolution and without an in-person board meeting.

27 The Montez Sale closed in January 2014.

28 The assets disposed of by Sears were its "crown jewels". It was plain that the divestment of these key assets in 2013, while Sears was struggling in the face of stiffer retail competition from Target and others, would have a dramatic negative impact on Sears. The negative impact in fact unfolded:

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

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

The 2013 Dividend

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

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

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

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

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

Lack of Notice to the Board

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

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

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

Lack of Information

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

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

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

(b) any written presentation analyzing the impact the proposed dividend would have on Sears' business, including taking into account possible downside scenarios; or

(c) any *pro forma* assessment of Sears' liquidity and cash flows following the payment of a dividend. Rather, the *pro forma* cash flows included in the Board Materials assumed that no dividend would be paid in either 2013 or 2014.

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

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

(a) management did not prepare a written presentation to the Board on the proposed dividend and there was no written recommendation or proposal from management to the Board; and

(b) the directors were not provided with legal advice with respect to their duties in connection with the declaration of a dividend.

Financial Uncertainty

42 On November 12, 2013, prior to the November Meeting, the Board received a financial update on the performance of Sears. Management reported that throughout the first

three quarters of the year, Sears had negative net income of $49 million ($27 million worse than the same period in 2012) and negative total cash flow of $26.3 million.

43 On November 14, 2013, the Investment Committee of Sears' Board was presented with material showing an estimated pension plan deficiency of $313 million at December 2013. The members of the Investment Committee were Crowley, Harker and Bird. This fact was not presented to the Board at the November Meeting.

44 In advance of the November Meeting, the Board was provided with only high level *pro forma* cash flows for 2014. The cash flows were based on a 2014 Plan EBITDA of $135 million, of which $118 million was based on aspirational changes to the business that management hoped would result in financial improvement but that management and the Board should have known were unreasonably optimistic. Moreover, the *pro forma* cash flows presented to the Board assumed the receipt of proceeds of the Montez Sale even though the transaction had not closed. Again, no information was provided to the Board on the impact an extraordinary dividend would have on future investment opportunities and future cash flows.

45 The Board Materials did however include two analyst reports, both of which reviewed the financial circumstances of Sears and predicted its eventual failure:

> **Desjardins Capital Markets Report (October 30, 2013)**
>
> As long as consumers do not perceive that Sears Canada is going out of business and desert it, Sears may be able to manage its demise slowly over time, selling prime and non-core assets, and waiting for the elusive purchaser of 60–80 store locations to appear.

CIBC Report (November 4, 2013)

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

A Conflicted Board

46 The 2013 Dividend was approved by the Board unanimously and without any abstentions.

47 Crowley and Harker participated in the Board's deliberations to pay the 2013 Dividend and approved the payment of the 2013 Dividend despite the fact that Sears had specifically determined that:

(a) Crowley and Harker were not "independent" directors; and

(b) pursuant to National Instrument 52-110, Crowley and Harker had a material relationship with Holdings and/or ESL that could "be reasonably expected to interfere with the exercise of [their] independent judgment."

48 Further, Crowley did not disclose to the Board that he, Lampert and Stollenwerck were personally involved in the 2013 real estate divestitures or that the timetable and size of the proposed dividend was dictated by ESL Investment's need for funds. Rather, the Board was led to believe that Sears' management was responsible for the 2013 real estate divestures. For example, Crowley expressly advised the independent members of the Board: "I do not think that the Board or the independents should attempt to insert themselves in the negotiations [of real estate transactions]. Bill [Harker] and I did not and do not do that."

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

Departure from Past Governance Practices

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

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

(a) multiple Board meetings on September 7, 2005, September 14, 2005, and December 2, 2005 to discuss the merits and risks of a potential dividend in light of the company's operational needs;

(b) multiple oral presentations from management and a dividend recommendation by the Chief Financial Officer;

(c) separate meetings between the independent directors of Sears and the Chief Financial Officer to assess the company's financial state;

(d) legal advice from both in-house and external counsel to the Board; and

(e) review by the Board of draft press releases and an officer's certificate with respect to the dividend.

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

(a) multiple meetings of the Board on April 23, 2010, May 7, 2010, and May 18, 2010 to discuss the merits and risks of a potential dividend in light of the company's operational needs;

(b) separate meetings of the independent directors on May 7, 2010 and May 12, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operational needs;

(c) multiple presentations by management, including a 40-page presentation dated April 23, 2010 and a subsequent 20-page presentation dated May 7, 2010, providing detailed analyses of excess cash and financial forecasts (with downside scenarios) for multiple dividend options;

(d) a dialogue between management and the Board continuing over several meetings with respect to various options for a potential dividend;

(e) consideration of multiple potential uses for excess cash, including cash dividends in various amounts, a substantial issuer bid and a normal course issuer bid; and

(f) a deferral of half the proposed dividend pending a full assessment of the company's operational needs.

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

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

(b) multiple presentations by management, including a "capital structure update" dated August 3, 2010 and a 32-page presentation assessing the capital structure of the company and potential dividend options, including financial forecasts and downside scenarios, which the Board reviewed in advance of approving the dividend; and

(c) a separate meeting of the independent directors on or around September 8, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operational needs.

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

(a) a meeting on December 12, 2012 which included thorough discussion and analysis of the impact of a potential dividend on available cash, EBITDA and total debt, the company's need to retain cash for operational uses, and downside scenarios in respect of a possible dividend;

(b) a report entitled "Dividend Discussion" which was prepared by Sears' Chief Financial Officer and which the Board reviewed in advance of approving the dividend; and

(c) a review of the draft officer's certificate with respect to the dividend by external counsel to the independent directors, and a dialogue with the Chief Financial Officer of Sears addressing counsel's comments.

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

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

The 2013 Dividend is a Transfer at Undervalue and Void

A Transfer at Undervalue

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

(a) Holdings: $259,811,955;

(b) ESL : $88,626,400;

(c) Lampert: $52,165,440; and

(d) Harker: $23,020.

Non-Arm's Length Dealings

58 At all materials times:

(a) Holdings was the controlling shareholder of Sears, was a related entity to Sears, and was not dealing at arm's length with Sears;

(b) ESL and Lampert exercised both *de facto* and *de jure* control over Holdings. As Holdings stated in its 2013 Annual Report, Mr. Lampert had "substantial influence over many, if not all, actions to be taken or approved by our stockholders"; and

(c) ESL and Lampert were not dealing at arm's length with Sears as a result of their direct and indirect beneficial control position in Holdings, which in turn held a controlling interest in Sears. Further, Holdings, ESL and Lampert collectively held more than 75% of Sears' shares, acted in concert with respect to the control of Sears, and specifically acted in concert and with a single mind to exercise influence over Sears in connection with the 2013 Dividend and the Monetization Plan.

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

Intention to defraud, defeat or delay Sears' creditors

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

specific intention to prioritize the interests of Holdings, Lampert and ESL over Sears' creditors and other stakeholders.

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

(a) a non-arm's length transaction made outside the usual course of business;

(b) paid in the face of significant outstanding indebtedness to Sears' creditors, including pensioners, in circumstances in which:

(i) Sears had no operating income to repay its debts, including to its pensioners and other creditors;

(ii) applying reasonable assumptions, the Board could only reasonably have expected Sears to be significantly cash flow negative from 2014 onwards; and

(iii) the Board had no real plan to repay such indebtedness;

(c) paid in circumstances that raise a series of "red flags", including as a result of the following facts:

(i) the 2013 Dividend was declared with unusual haste and with no advance notice to the Board;

(ii) the 2013 Dividend was declared in the absence of proper Board materials and with a deficient corporate governance process;

(iii) the Board received no independent legal advice to properly discharge its duties with respect to a material transaction involving related parties: Holdings, ESL and Lampert;

(iv) the divestiture of Sears' crown jewel assets had an obvious negative impact on its business;

(v) Sears had not addressed its negative cash flows or operational challenges despite years of effort;

(vi) there were clear conflicts of interest within the Board and management at the time the 2013 Dividend was declared; and

(vii) the 2013 Dividend was driven by Lampert, Bird as Chief Financial Officer of Sears, and Crowley and Harker as non-independent directors of Sears, in order to satisfy ESL Investments' urgent need for funds.

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

63 Sears knew or recklessly disregarded the fact that the 2013 Dividend would defraud, defeat or delay Sears' creditors.

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

ESL, Lampert, Crowley and Harker are Liable as Privies

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

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

Director Indemnities

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

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

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

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

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

November ●, 2018

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FTI Consulting Canada Inc., in its capacity as Court-appointed monitor	and	ESL Investments Inc. *et al.*	Court File No.:
Plaintiff		Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

STATEMENT OF CLAIM

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APPENDIX “B”
SAMPLE MEDIA REPORT

THE WALL STREET JOURNAL.
The Wall Street Journal Online

December 5, 2013
WSJ.com Edition

Lampert Sees Fund Investors Check Out; Sears CEO's Hedge Fund Is Returning Billions of Dollars to Goldman Clients

BYLINE: Juliet Chung

SECTION: MARKETS

LENGTH: 989 words

Edward S. Lampert, struggling to stem heavy losses at Sears Holdings Corp., is facing an exodus of money from his hedge fund.

Mr. Lampert's hedge fund is returning billions to clients of Goldman Sachs Group Inc. who had invested with ESL Investments Inc. in 2007, according to people with knowledge of the matter. Under that deal, Goldman's clients, such as corporate pension plans, put roughly $3.5 billion with Mr. Lampert, and they have asked for it back.

The investors are receiving part of their funds in stock rather than all-cash, a redemption technique Mr. Lampert has used before. In June, ESL paid departing investors in part with the stock of a small company that ESL was invested in-Orchard Supply Hardware Stores Corp., a Sears spinoff. A week later, Orchard filed for bankruptcy protection.

The recent events mark a reversal for Mr. Lampert, a lauded investor whose fund has made a huge bet that he can revive Sears. Mr. Lampert, Sears's longtime chairman, took over as the retailer's chief executive in January but hasn't been able to turn around the

company.

In 2007, when Goldman's clients were offered access to Mr. Lampert's fund, he was a star of the hedge-fund world, commanding some of its strictest terms-a minimum $25 million investment and the ability to lock up investors' money for five years.

The redemption requests from the Goldman clients were submitted last year in advance of the expiration of the lockups. Without the money raised through Goldman, more than $2.5 billion in outside investor money is expected to remain, the people said.

Mr. Lampert, a former Goldman trader, also invests billions of his money in ways that mirror the positions in the fund.

The exit of Goldman's investors largely returns Mr. Lampert's investor base to what it was before 2007: a core group of wealthy, individual investors who have profited handsomely by investing with him over many years.

One exception: longtime investor Michael Dell of Dell Inc., whose multibillion-dollar family office has pulled out of ESL as it sheds its outside investments in favor of putting money to work directly.

Some people said their faith in Mr. Lampert is intact.

"This might be the time people should consider investing" with Mr. Lampert, said one client on Thursday, describing Mr. Lampert as one of the most talented investors he knew.

Another person familiar with Mr. Lampert described him as an investing visionary and noted that even Steve Jobs was fired from Apple Inc. at one point.

ESL has notched annualized returns of more than 20% a year for 20 years, according to a person familiar with Mr. Lampert, one of the strongest long-term track records in the industry.

The returns of late have been volatile, including a 33% loss in 2008, then 55% and 16% gains in 2009 and 2010, and a 12% loss in 2011. ESL has posted gains this year and last, according to people familiar with the firm, who didn't provide figures.

Mr. Lampert is a so-called value investor who makes concentrated bets intended to pay out over the long-term. He has long subscribed to the philosophy that his clients were paying him to invest their money profitably, not to explain his thinking on those investments, said a person familiar with Mr. Lampert.

Goldman's clients earned profits with ESL, beating the S&P 500, according to people familiar with the matter. But they defected in part because of the fund's lower-than-expected returns during their investment period, even though Mr. Lampert had cautioned during marketing meetings in 2007 not to expect his historic high returns, the people said.

Some of the investors requested redemptions in 2008 during the financial crisis, when many institutions and individuals were strapped for cash, and they were frustrated when ESL refused, the people said.

One of his highest-profile investments was in Kmart Corp., which he helped bring out of bankruptcy proceedings in 2003 at the equivalent of $17 a share and then helped merge with Sears, Roebuck & Co. in 2005 to create Sears Holdings.

The deal was seen as a savvy bet on the company's real estate and a short-term validation of Mr. Lampert's theories for running a retailer. Sears shares surged to $163.50 in 2005.

Since the merger, revenue has plunged by more than $13 billion as of the end of the company's last fiscal year, and Sears is on track to book its third consecutive year of losses. "The confidence I had over 10 years of what's possible, it has been shaken over time," Mr. Lampert said at the company's annual meeting.

Despite the weakening performance, Sears stock is up about 20.8% on the year, but is down 21.3% this week. Mr. Lampert said Tuesday that he was paying some of his departing investors in Sears stock, rather than cash. The move reduced his total stake in the company to 48.4%, and sparked a sell-off in Sears shares, which dropped 7.7% in heavy volume that day. It closed Thursday at $49.98, down 94 cents, or 1.8%.

Fund managers typically will give back such "in-kind distributions" when doing so is either advantageous to their investors for tax reasons, lawyers say, when they are limited in what they can sell because of securities rules or when a manager is trying to meet redemption requests while avoiding a fire-sale of assets.

"In general, investors don't like in-kind distributions," said Bert Fry, a partner at Pryor Cashman LLP who focuses on hedge funds. "At a minimum, it puts them in the position of having to make the exact investment decision that they'd hired a portfolio manager to make."

In the case of Orchard, the company signaled early in June that a bankruptcy filing was possible. Its shares closed at $2.48 June 10, the day ESL or related entities distributed them to clients "on a pro rata basis to limited partners that elected to redeem all or a portion of their interest," according to a regulatory filing.

The company filed for bankruptcy protection on June 17. Its assets were acquired by Lowe's Cos. in August.

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APPENDIX "C"
FORM OF OPT-OUT NOTICE AND CREDITOR COMMUNICATION

OPT-OUT LETTER

TO: UNSECURED CREDITORS OF SEARS CANADA INC. (the "**Creditors"**)

NOTICE TO CREDITORS REGARDING CLAIMS BY DOUGLAS CUNNINGHAM, Q.C., IN HIS CAPACITY AS THE COURT-APPOINTED LITIGATION TRUSTEE FOR SEARS CANADA INC. AGAINST 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 (the "**Litigation Trustee Claim**")

NOTICE TO CREDITORS REGARDING CLAIM BY FTI CONSULTING CANADA INC., AS COURT-APPOINTED MONITOR OF SEAS CANADA INC. AGAINST 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 (the "**Monitor Claim**")

On June 22, 2017, Sears Canada Inc., among others, commenced court-supervised restructuring proceedings under the Companies' Creditors Arrangement Act ("**CCAA**") pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). FTI Consulting Canada Inc. has been appointed by the Court as monitor in the CCAA proceedings (the "**Monitor**").

On March 2, 2018, the Court issued an Order appointing Lax O'Sullivan Lisus Gottlieb LLP as litigation investigator (the "**Litigation Investigator**") to identify and report on certain potential rights and claims of Sears Canada Inc., among others, and/or creditors of Sears Canada Inc, among others. The order was amended on April 26, 2018.

TAKE NOTICE THAT pursuant to Orders of the Court dated November 19, 2018:

1. At the request of the Litigation Investigator, the Honourable J. Douglas Cunningham, Q.C. was appointed as Litigation Trustee (in such capacity, the "**Litigation Trustee**") over and in respect of the Litigation Trustee Claim, as described in greater detail in the First Report of the Litigation Investigator, dated November ___, 2018, and was authorized, empowered and directed to do all things and carry out all actions necessary to prosecute the Litigation Trustee Claim.

2. The Monitor was authorized, empowered and directed to do all things and carry out all actions necessary to prosecute the Monitor Claim, which is described in greater detail in the Twenty-Seventh Report of the Monitor, dated November ___, 2018.

3. The costs of pursuing the Litigation Trustee Claim and the Monitor Claim (the "**Litigation Costs**") shall be funded by Sears Canada Inc. from cash currently in possession of the Monitor that is not the subject of any encumbrance. The Litigation Costs are currently estimated at $12 million.

4. Any Creditor who does not wish to have its recoveries, if any, as an unsecured creditor of Sears Canada Inc. reduced by such creditor's pro rata share of the Litigation Costs may opt-out of participation in the Litigation Trustee Claim and the Monitor Claim (the "**Opt-out**"). As a consequence of exercising such Opt-out right, such creditor will also not receive a distribution of any portion of any recoveries of the Litigation Trustee Claim or the Monitor Claim.

Copies of the Twenty-Seventh Report of the Monitor and the First Report of the Litigation Investigator, including copies of the draft statements of claim relating to the Litigation Trustee Claim and the Monitor Claim and additional information regarding the Opt-out are available at the Monitor's website: www.cfcanada.fticonsuting.com/Searscanada.

IF YOU WISH TO EXERCISE THE OPT-OUT, you must, before _____, 2018, provide an Opt-Out Notice (in the form attached hereto as Schedule "A") indicating that you wish to Opt-out to:

FTI Consulting Canada Inc.,
in its capacity as Court-appointed Monitor of Sears Canada Inc., among others
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, ON, M4K 1G8
Fax: 416-649-8101

Attention: Elizabeth Pearson

Persons requiring further information should review the website established by the Monitor http://cfcanada.fticonsulting.com/Searscanada or call the Monitor's Hotline at 1-855-649-8113.

Schedule “A”

Opt-Out Notice

OPT-OUT NOTICE

TO: **FTI CONSULTING CANADA INC.**,
in its capacity as Court-appointed Monitor of Sears Canada Inc., among others
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario
M4K 1G8

Fax: 416-649-8101

Attention: Elizabeth Pearson

RE: **Order Of The Ontario Superior Court of Justice (Commercial List) Granted November 19, 2018, In The Matter of Sears Canada Inc., et al. (Court File No. CV-17-11846-00CL) (the "Opt-out Order")**

Capitalized terms used herein and not otherwise defined have the meanings given to them in the Opt-out Order.

I hereby provide written notice that I wish to opt-out of participation in the Litigation Trustee Claim and the Monitor Claim.

I hereby confirm I understand that, by exercising this right to opt-out, my recoveries, if any, as an unsecured creditor of Sears Canada Inc. will not be reduced by any costs of the Litigation Trustee Claim or the Monitor Claim and will not be increased by any recoveries from the Litigation Trustee Claim or the Monitor Claim.

I hereby further confirm that I understand that this decision to exercise my opt-out right is irrevocable.

Dated this _____ day of _____, 2018.

_____ _____

Witness Signature

Name [please print]: _____

Address: _____

_____

_____

Telephone: _____

NOTE: TO OPT OUT, THIS FORM MUST BE COMPLETED AND RECEIVED AT THE ABOVE ADDRESS ON OR BEFORE

_____, 2018.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., *et al.*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

TWENTY-SEVENTH REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR

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Lawyers for FTI Consulting Canada Inc., in its capacity as Monitor

TAB 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	●, THE ●th
	)	
JUSTICE HAINEY	)	DAY OF NOVEMBER, 2018

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

TRANSFER AT UNDERVALUE PROCEEDING
APPROVAL ORDER

THIS MOTION, made by FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor (the "**Monitor**") of the Applicants in these proceedings for an order to commence certain proceedings was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Monitor and the twenty-seventh report of the Monitor dated November **[●]**, 2018 (the "**Twenty-Seventh Report**") and on hearing the submissions of counsel for the Monitor and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of **[●]**, sworn November [●], 2018, filed:

TRANSFER AT UNDERVALUE CLAIM

1. **THIS COURT ORDERS** that the Monitor is authorized and empowered pursuant to section 36.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") to commence and continue a claim against 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 (the "**Transfer at Undervalue Proceedings**") under section 96 of the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, c. B-3, as amended (the "**BIA**"), as incorporated into the CCAA under Section 36.1, relating to the dividend paid to shareholders of Sears Canada Inc. ("**SCI**") on December 6, 2013 in the amount of approximately $509 million (the "**2013 Dividend**") as further described in the Twenty-Seventh Report, and as set out in the draft statement of claim appended thereto, with such amendments as the Monitor deems appropriate.

2. **THIS COURT ORDERS** that the granting of this Order permitting the Monitor to commence the Transfer at Undervalue Proceedings does not constitute a determination of any liability under the Monitor's claim.

3. **THIS COURT ORDERS** that the Monitor is authorized to bring the Transfer at Undervalue Proceedings in this Court.

4. **THIS COURT ORDERS** that the stays of proceedings provided for under the initial order issued by this Court, as amended and restated on July 13, 2017 (the "**Initial Order**"), as they apply to former directors of SCI are hereby lifted solely to allow the Monitor to commence and continue the Transfer at Undervalue Proceedings against William Crowley and William Harker.

5. **THIS COURT ORDERS** that in addition to the powers provided to the Monitor pursuant to the Initial Order and the obligations imposed upon those with information and records

pertaining to the Applicants, the Applicants shall cooperate fully with the Monitor in relation to the Transfer at Undervalue Proceedings and the Applicants shall incur no liability by reason of the cooperation referred to in this paragraph.

PROTECTIONS TO THE MONITOR

6. **THIS COURT ORDERS** that in relation to all matters connected with the Transfer at Undervalue Proceedings, the Monitor shall have all of the rights, powers and protections provided for pursuant to the Initial Order.

7. **THIS COURT ORDERS** that the Monitor shall continue to have the benefit of the protections provided under paragraph 34 of the Initial Order in the exercise of its powers under this Order, including, without limitation, the commencement and continuation of the Transfer at Undervalue Proceedings.

8. **THIS COURT ORDERS** that the foregoing does not preclude the Court from awarding legal costs associated with the Transfer at Undervalue Proceedings in favour of a party to the Transfer at Undervalue Proceedings and in the event that such costs are awarded against the Monitor, the Monitor shall have a claim for indemnity against the Property (as such term is defined in paragraph 4 of the Initial Order) to satisfy any such costs award ("**Monitor's Cost Indemnity Claim**") and such indemnity claim shall be secured by the Administration Charge (as such term is defined in paragraph 37 of the Initial Order) created in accordance with the Initial Order, as amended by this Order.

9. **THIS COURT ORDERS** that the Initial Order shall be amended as necessary so as to provide that the maximum aggregate amount of the Administration Charge is equal the sum of $5 million plus the amount of the Monitor's Cost Indemnity Claim.

COSTS AND OPT-OUT MECHANISM

10. **THIS COURT ORDERS** that the Monitor shall separately account for any costs directly related to the Transfer at Undervalue Proceedings and any claims pursued on the recommendation of the Litigation Investigator (as defined in the Twenty-Seventh Report) (the "**LI Claims**") from any other costs to administer the estates of the Applicants.

11. **THIS COURT ORDERS** that unsecured creditors of SCI who do not wish to have their distributions, if any, affected by the costs or recoveries of the Transfer at Undervalue Proceedings or the LI Claims (the "**Opt-out Creditors**") shall have the option to opt out of such participation and such Opt-out Creditors' recoveries will be neither increased by any recoveries from such claims nor reduced by the costs of pursuing such claims, including the costs of any Monitor's Cost Indemnity Claim.

12. **THIS COURT ORDERS** that the form of opt-out notification attached as Appendix "C" to the Twenty-Seventh Report (the "**Opt-out Notice**") is hereby approved and the Monitor is authorized and directed to, as soon as practicable, deliver the Opt-out Notice to all unsecured creditors of SCI (other than those creditors represented by Employee Representative Counsel and Pension Representative Counsel (in each case as defined in the Twenty-Seventh Report)) having unsecured claims that are either resolved or disputed in amounts in excess of $5,000 to the address shown on such unsecured creditor's proof of claim filed in accordance with the Claims Procedure Order granted on December 8, 2018 in these proceedings. The Monitor is further authorized and directed to, as soon as practicable, deliver the Opt-out Notice to Employee Representative Counsel, Pension Representative Counsel and to Morneau Shepell Limited, as administrator of the Sears Canada Pension Plan. Employee Representative Counsel and Pension Representative Counsel shall each be authorized to determine whether an Opt-out Notice should be completed and delivered on behalf of those parties they represent

and, following such determination, either elect to deliver or not deliver such Opt-out Notice on behalf of those parties they represent. Morneau Shepell Limited, as administrator of the Sears Canada Pension Plan, shall be authorized to determine whether an Opt-out Notice should be delivered in connection with the Sears Pension Claim (as defined in the Employee and Retiree Claims Procedure Order granted on February 22, 2018) and, following such determination, either elect to deliver or not deliver such Opt-out Notice in connection with the Sears Pension Claim. Any creditor, including Morneau Shepell Limited, (or Employee Representative Counsel or Pension Representative Counsel on behalf of the parties they represent) who receives an Opt-out Notice and returns such Opt-out Notice executed to the Monitor at the address shown on the Opt-out Notice so that it is received by the Monitor on or before sixty days after the date of delivery thereof to such creditor (or Employee Representative Counsel or Pension Representative Counsel on behalf of the parties they represent) shall have irrevocably agreed to be treated as an Opt-out Creditor in these proceedings. All other unsecured creditors of SCI shall be deemed not to be Opt-out Creditors.

DIRECTORS' AND OFFICERS' INDEMNITY CLAIMS

13. **THIS COURT ORDERS** that any recoveries received from any current and former directors and officers of SCI pursuant to the Transfer at Undervalue Proceedings will be net of any distributions that would have been payable to such directors and officers on account of such directors' and officers' corresponding valid unsecured indemnity claims against SCI, if any.

GENERAL

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States or any other jurisdiction to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order, including the U.S. Bankruptcy Court.

All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., et al.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

TRANSFER AT UNDERVALUE PROCEEDING APPROVAL ORDER

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., et al.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

MOTION RECORD OF THE MONITOR
(Transfer at Undervalue Proceeding Approval)
(returnable November 19, 2018)

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