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May 18, 2006

Mark A. Gelowitz
Direct Dial: (416) 862-4743
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Our Matter Number: 1053316

Sent via Messenger and Email

Ontario Securities Commission
Suite 1800
20 Queen Street West
P.O. Box 55
Toronto, ON M5H 3S8

Attention: The Secretary to the Commission

Dear Sir:

Sears Canada Inc.

We are the solicitors for Sears Holdings Corporation. You will find attached our letter of May 2, 2006, addressed to Staff of the Ontario Securities Commission, which was delivered in response to the letter from the Davies firm dated April 25, 2006. Four hard copies have been delivered to you via messenger.

We are filing the attached letter with you so that it can be considered formally a part of the record in respect of the notice of hearing which we understand will be posted on the Commission's website today. We understand that the attached letter will be similarly posted on the Commission's website.

Please contact me with any questions you may have concerning the foregoing.

Yours sincerely,

"original signed"

Mark A. Gelowitz
MG:
Enclosure

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May 2, 2006

Donald C. Ross
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Our Matter Number: 1053316

Naizam Kanji
Manager
Take-over Bids, Mergers & Acquisitions
Ontario Securities Commission
Suite 1800
20 Queen Street West
P.O. Box 55
Toronto, ON M5H 3S8

Dear Mr. Kanji:

Sears Canada Inc. ("Sears Canada")

As you have requested, we are responding on behalf of Sears Holdings Corporation ("Sears Holdings") to the letter (the "Davies Letter") dated April 25, 2006 from Patricia Olasker to you, which makes numerous allegations and complaints about the Sears Holdings' offer for Sears Canada. In summary, the Davies Letter wholly fails to substantiate the allegations of violations of Ontario securities laws on the part of Sears Holdings in connection with the offer for Sears Canada. Instead, the Davies Letter is reduced to calling Sears Holdings "secretive" and "coercive" and claiming, without support, that Sears Holdings' offer for Sears Canada offends "the policy rationale underlying fundamental aspects of Ontario's securities laws in a manner contrary to the public interest." No cases, decisions (other than the unhelpful reference to Seel Mortgage) or legislative history are provided to support any violation of the *Securities Act (Ontario)* (the "Act") or its "policy rationale".

Below we respond to the Davies Letter, using its headings of Joint Actors and Minority Shareholder Approval, Section 97(2) - Collateral Benefits, Section 94(2) - Agreements to Acquire, Disclosure, Coercion and Relief Requested.

Joint Actors and Minority Shareholder Approval

The Davies Letter defined "Scotia Capital" as Scotia Capital Inc. and its affiliates. For the purpose of this letter the defined term "Scotia Capital" refers only to Scotia Capital Inc. Sears Holdings entered into separate support agreements ("Support Agreements") with the following parties (the "Support Agreement Parties"): Scotia Capital in respect of 511,000 Common Shares; Bank of Nova Scotia in respect of 4,000,000 Common Shares; and another significant Canadian financial institution ("CFI") in respect of 3,100,000

Common Shares. As required by applicable securities laws, the material terms of the Support Agreements are described in the Notice of Variation and Change in Information (the "Notice") dated April 7, 2006 of SHLD Acquisition Corp. ("SHLD").

Contrary to the assertions in the Davies Letter, there is no joint actor relationship between Scotia Capital and the Bank of Nova Scotia on the one hand and Sears Holdings on the other hand. Scotia Capital was retained by Sears Holdings as a financial advisor in respect of the take-over bid by SHLD on January 6, 2006 after a competitive process in which two other investment banks participated, not in November, 2005 as suggested in the Davies Letter. Under its engagement letter, Scotia Capital is entitled to a monthly work fee of $50,000 and customary expense reimbursement and indemnification. Scotia Capital would have been entitled to a success fee of $400,000 if the offer had been successfully concluded at $16.86 per share or less. Under the engagement letter, Sears Holdings may, in its sole discretion, pay a portion of the success fee to Scotia Capital if Sears Holdings acquires a majority of the minority shares at a price that is not significantly above $16.86 per share. Sears Holdings has not paid and does not intend to pay a success fee to Scotia Capital since the acquisition price is $18.00 per share. Accordingly, the Davies Letter is incorrect in its speculation that Scotia Capital is entitled to a success fee. Scotia Capital also agreed to form and manage a soliciting dealer group, for which it receives fees for shares acquired under the offer on the same basis as other investment dealers that are members of the soliciting dealer group, all of which is publicly disclosed.

Under the definition of joint actors in Rule 61-501, reference is made to section 91 of the Act. Accordingly, it is ultimately a question of fact whether parties are acting jointly or in concert. However, under the definition of joint actor in Rule 61-501, a security holder is not considered to be a joint actor in respect of a going private transaction solely because there is an agreement to vote in favour of the going private transaction. All negotiations in respect of the Common Shares subject to the Support Agreements have been conducted completely at arm's length, with each party bargaining solely in its own economic interest.

The advisory relationships between Scotia Capital and Sears Holdings under the engagement letter and the soliciting dealer agreement do not affect the conclusion that Sears Holdings was not acting jointly or in concert with Scotia Capital and the Bank of Nova Scotia. The advisory and soliciting dealer agreements provided for Scotia Capital and the members of the soliciting dealer group to provide customary services for customary fees. They were also entered into before Sears Holdings knew that Scotia Capital and Bank of Nova Scotia owned any Common Shares of Sears Canada. The fact that CFI, the other Support Agreement Party, reached an agreement which is in all material respects on the same terms as those reached by Scotia Capital and Bank of Nova Scotia demonstrates that the Support Agreements entered into with Scotia Capital and Bank of Nova Scotia were made on an arm's length basis. Scotia Capital's only

entitlement under its engagement letter and soliciting dealer agreement is to its monthly fee, expense reimbursement, per share soliciting dealer fees for shares tendered and indemnification. Given the relative economic insignificance of Scotia Capital's entitlements relating to its advisory role in relation to the take-over bid in comparison to the economic value of the large shareholdings of Bank of Nova Scotia and Scotia Capital, and the similar Support Agreement that was entered into by CFI, it should be evident that Scotia Capital and Bank of Nova Scotia have not been influenced in their decision to tender or vote their respective interests in 4,511,000 Common Shares by the fee arrangements of Scotia Capital.

Further, neither Scotia Capital nor the Bank of Nova Scotia acquired Common Shares on behalf of Sears Holdings. Sears Holdings' understands that the Common Shares subject to the Support Agreements were owned by Scotia Capital and the Bank of Nova Scotia prior to Sears Holdings entering into the engagement letter with Scotia Capital. Thus, Sears Holdings submits there is no basis to assert that any of the Support Agreement Parties are, or will be at the time of the vote on the going private transaction, joint actors with Sears Holdings in respect of the going private transaction.

We note that in the *Report of the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Take-over Bids and Issuer Bids* dated September 23, 1983 (the "Three Wisemen's Report"), which formed the basis of the current provisions of the Act found in section 91 of the Act, the following was stated in section 3.27:

> "Our goal in providing broad guidance to the concept of a joint actor and using that concept and the concepts of associates and affiliates within the various rules prescribed by Part XIX is to ensure that all persons or companies who are effectively engaging in a common investment or purchase program, whether in support of or in opposition to a take-over bid, will be required to abide by the rules that govern securities transactions prior to, during and subsequent to the bid."

There was and is clearly no common investment or purchase program in effect between Sears Holdings and Scotia Capital and the Bank of Nova Scotia.

In addition, the provisions in section 91 of the Act referring to actions of a registered dealer were introduced against a background of dealers advising companies in a take-over bid that had acquired securities of the target during the bid. To Sears Holdings' knowledge, Scotia Capital and the Bank of Nova Scotia held and continue to hold full legal and beneficial ownership of the shares subject to the Support Agreements.

Without any factual basis to suggest that Scotia Capital and the Bank of Nova Scotia are acting jointly or in concert with Sears Holdings with respect to the Support Agreements, the Davies Letter goes to absurd lengths in suggesting that "public interest" concerns should affect the determination. Under Rule 61-501 and section 91 of the Act, the inquiry as to whether parties are acting jointly or in concert is a factual one. Turning the

statutory provisions on their head, the Davies Letter suggests on page 7 that the "public interest compels a finding that Scotia Capital is a joint actor with Holdings." Sears Holdings suggests that the facts are clear that Scotia Capital and the Bank of Nova Scotia are not joint actors under section 91 of the Act and there is no basis to override the facts and the statutory provisions with an appeal to the "public interest".

Minority Shareholder Approval

With respect to minority approval, section 8.1(2) of Rule 61-501 sets out the votes that are excluded from minority approval, and there is no basis under the Rule for excluding the votes of Scotia Capital and Bank of Nova Scotia. The Davies Letter makes allegations of "secretive transactions", all of which were fully disclosed to the market save for the names of the participants, as "compelling a finding" that votes are not entitled to be counted as part of the minority, which is yet another assertion without any law, policy or facts to support it. Pershing acknowledges in the Davies Letter that it has no legal or beneficial ownership of any of the shares subject to the Support Agreements. Pershing divested itself of all legal and beneficial ownership in 6.9 million Common Shares and its claim to an "economic interest" is as a result of cash-settled total return swaps entered into with SunTrust Capital Markets through swaps. So the Davies Letter goes on to suggest that "conventional economic interest" in the shares is a criterion for voting as part of the minority. There is absolutely no basis for this conclusion. To accede to this argument would be to allow those who chose to give up the right to own and vote shares to eliminate the voting rights of others who subsequently acquire shares, including through market purchases. The right to vote lawfully belongs to the owner of the shares and there is no basis under Rule 61-501 for introducing a new category of shareholders that are excluded from the minority. This is a classic case of trying to have things both ways.

Sears Holdings believes that the Support Agreement Parties have an economic interest in the Common Shares subject to the Support Agreements. With respect to Scotia Capital and the Bank of Nova Scotia, we understand that Gary Girvan of McCarthy Tetrault will address this point. Second, even if they did not have an economic interest (which is not the case), Rule 61-501 does not exclude from the minority persons who do not have an "economic interest" in the Common Shares.

There is no policy reason to introduce an "economic interest" requirement into the legislation, and no pragmatic way to do so. Shareholders without economic interests routinely vote, such as shareholders who have sold their shares but were shareholders on the record date set for a shareholder's meeting or shareholders who have no beneficial interest in the shares, but solely dispositive power, such as a trustee or a fund manager. Further, a person may have an economic interest when the vote is cast but may subsequently lose that interest before the transaction is consummated. A person may not have an economic interest when they vote, but know or have an expectation that they will

have an economic interest at the closing of the transaction to which the vote relates. A person subject to a derivative transaction without an economic interest could enter into another transaction that restores an economic interest. A person that owns shares and then sells the shares short to be without an economic interest may cover the short sale later and restore the economic interest. On a practical basis, there is no way of determining when votes would be cast by persons without an economic interest if this were to become a legal requirement. This is a subject where clarity as to who has voting rights is essential for shareholders and for the corporation that issued the shares, in order to enable them to determine who may vote. Ambiguity would create paralysis. We submit that the legislation has wisely steered clear of attempting to utilize economic interest as a factor in calculating the majority of the minority.

To attempt to restrict the Support Agreement Parties from voting as part of the minority in this case would also be unsound from a policy perspective. In this case Pershing, without disclosure to the public, entered into cash-settled derivative transactions, sold its legal and beneficial interest in the Common Shares it held, including the right to vote such shares, and for a fee received an economic interest parallel to the interest in the shares that it had when it owned those shares. The statements made by Mr. Ackman of Pershing in the Wall Street Journal article of April 12, 2006 make it clear that Mr. Ackman believed that derivative transactions would in practice result in Common Shares which Pershing did not own or control being voted as he specified or not voted at all. To exclude the votes of a holder of shares because that holder (Bank of Nova Scotia) chose to cover a swap position would be unfair to Sears Holdings and would encourage the secret acquisition of shares pursuant to derivative transactions. By doing so, a person in Mr. Ackman's position would, without an actual investment in the shares underlying the derivative transaction, be able to control the voting of such shares or at least be able to reduce the number of minority shares available to be voted. Either result would mean that a relatively small investment could provide a blocking position to a successful bid for all shares.

Either result of such derivative transactions could also constitute an abusive minority tactic. In Section 3.3 of the OSC's Companion Policy to Rule 61-501, the Commission states, "As the purpose of the Rule is to ensure fair treatment of minority security holders, abusive minority parties in a situation involving a minimal minority position may cause the Director to grant an exemption from the requirement to obtain minority approval." The way to ensure that the use of derivatives by Pershing in this case, and by others more generally, does not constitute an abusive minority tactic is to allow the Support Agreement Parties to vote their Common Shares of Sears Canada in the second stage business combination. If Pershing wants to vote Common Shares of Sears Canada it should have to acquire such shares, like other shareholders.

This is also not a transaction which calls for a mid-transaction adjustment to the rules set out in Rule 61-501. In addition to achieving the support of a majority of the minority, the transaction has been supported by the two largest minority shareholders, both of which are sophisticated and long-term holders that represent over 35% of the minority. It is also a premium offer made for a company whose stock price has doubled in value in the last year. The only complaints are from parties who concealed their holdings and "economic interest" from the market until recently and now say they own or control 8,241,572 Common Shares.

Section 97(2) - Collateral Benefits

The Davies Letter suggests that the Support Agreement Parties have received a collateral benefit under the offer contrary to section 97 of the Act. Sears Holdings believes that no collateral benefit has been offered to or received by Support Agreement Parties. SHLD and Sears Holdings have offered the same consideration to all holders of Common Shares of Sears Canada Inc. under the offer - there is no collateral benefit being provided to the Support Agreement Parties. An offer price of $18.00 per Common Share at any time until August 31, 2006 is the consideration offered to all Sears Canada shareholders who choose to tender their Commons Shares to the offer, as is the opportunity to participate in a going private transaction at $18.00 per share in a second step business combination.

The Davies Letter makes references to restructuring the Offer and the proposed second step going private transaction, but the only variation was to extend the offer and agree to vote in favour of a second stage transaction (which Sears Holdings always contemplated effecting) in December. Sears Holdings bears the risk that the value of Sears Canada will decline prior to the completion of the going private transaction. The Davies Letter suggests, once again without authority, that the transaction is at the "expense of the minority shareholders by unduly and unreasonably delaying the ability of the minority shareholders to exercise their appraisal remedy." First of all, this has nothing to do with a collateral benefit. Secondly, there is no right for shareholders to dissent unless and until a going private transaction is proposed and voted on at a meeting – the only right to "dissent" during a take-over bid is the right not to tender shares to the bid. Third, Sears Canada shareholders who believe the value of Sears Canada will increase during the year are given the opportunity to dissent when Sears Canada may be more valuable and thereby realize more for their shares.

For the sake of completeness, we note that the Support Agreements do not prevent the parties thereto from tendering to the offer as suggested in the last sentence of the second full paragraph on page 9 of the Davies Letter, nor does the Notice suggest that the parties have deprived themselves of this right.

94(2) - Agreements to Acquire

Sears Holdings has not entered into an agreement to acquire beneficial ownership of the Common Shares by entering into the Support Agreements. Sears Holdings has made no offer to purchase securities. All it has agreed to do is to convene a meeting to effect a going private transaction at which all holders of Common Shares will have the opportunity to vote, which the offer always contemplated Sears Holdings would do. We note that corporations frequently enter into support agreements to complete a second stage transaction, and there has never been an allegation of a breach of section 94(2). Section 94(2) was designed to restrict purchases of Common Shares during a take-over bid, not deal with voting agreements. As set out in the Three Wisemen's Report, commenting on the draft legislation that would become section 94(2):

> "The Draft also curtails an offeror's purchases in the market during the time period in which its circular bid is outstanding ... If pre-bid and post-bid purchases are to be integrated then it is logical to prohibit negotiated purchases during the currency of the take-over bid."

With no law to back up their assertion, the Davies Letter is reduced to saying the Support Agreements "offends both the policy and intent behind s. 94(2)", which, as the Three Wiseman's Report indicates, is not the case.

Disclosure

As reported in the Wall Street Journal article of April 12, 2006, Pershing apparently believed that parties to derivatives contracts would vote 6.9 million Common Shares as Pershing directed, or at least not vote them against Pershing's wishes. Pershing has yet to comply with section 102 with respect to its acquisitions and perhaps other provisions of the Act. In contrast, Sears Holdings has scrupulously complied with all applicable disclosure requirements. The Complainants' allegations of non-disclosure are not premised on the requirements of the Act, but on their own incorrect interpretations of the Act and Rule 61-501, which as noted above, are without substance. Sears Holdings is under no legal obligation to publicly disclose the names of parties to the Support Agreements.

Sears Holdings believes that confusion may exist in the market, but believes this is as a result of Pershing's press releases and statements to the press that it has legal rights to assert in addition to a dissent right, which it does not, and that it has rights with respect to 6.9 million common shares, when in fact it has none. The market may not understand the effect of cash-settled derivative transactions, and Pershing has not publicly disclosed its rights under those transactions. Sears Holdings believes that Sears Canada shareholders may think that Pershing has rights that it does not have. Having fed media speculation, including the reference to its irrelevant "economic interest" and urged shareholders not to tender into the bid, Pershing is now seeking to rely on the confusion it has created in the

market as a basis for erroneously alleging non-compliance and non-disclosure by Sears Holdings.

Coercion

There has been no coercion of Sears Canada shareholders as the true facts and proper analysis discussed above make clear. A majority of the minority shareholders, including the two largest minority shareholders, have chosen to support the Sears Holdings' offer. The offer is a premium transaction for a stock that has doubled in the past year and which has received the support of significant, sophisticated and long-term shareholders.

Relief Requested

The relief requested by the Complainants is completely unfounded in law and policy. There is no basis to exclude the votes of the Support Agreement Parties for any going private transaction, nor is there any basis to make any order against Sears Holdings or SHLD in the public interest.

Because the contents of the Davies Letter have been provided to the public through the April 28, 2006 *National Post* article, presumably by Pershing because Mr. Ackman was interviewed for the article, it is important that the result of your investigation of the allegations in the Davies Letter also be communicated to the public in order to provide full disclosure to the marketplace. Accordingly, we request that the OSC staff issue a press release when it has completed its investigation of the allegations into the Davies Letter setting forth its conclusions.

Please feel free to call me or my partner, Donald Gilchrist, should you wish to discuss any of the foregoing.

Yours very truly,

Donald C. Ross
DR:ll

cc: William Crowley, *Sears Holdings Corporation*
William R. Harker, *Sears Holdings Corporation*
Donald Gilchrist, *Osler, Hoskin & Harcourt LLP*
Mark A. Gelowitz, *Osler, Hoskin & Harcourt LLP*