IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, CHAPTER S.5, AS AMENDED

— AND —

IN THE MATTER OF
SEARS CANADA INC.,
SEARS HOLDINGS CORPORATION,
AND SHLD ACQUISITION CORP.

— AND —

IN THE MATTER OF
HAWKEYE CAPITAL MANAGEMENT, LLC,
KNOTT PARTNERS MANAGEMENT, LLC, and
PERSHING SQUARE CAPITAL MANAGEMENT, L.P.

SUBMISSION OF
STAFF OF THE ONTARIO SECURITIES COMMISSION

1. This submission sets out our preliminary views regarding the application by Sears Holdings Corporation and SHLD Acquisition Corp (collectively, the **Offerors**) dated October 13, 2006 for a stay of the Commission's August 8, 2006 cease trade order (the **Cease Trade Order**). Terms used in this submission but not defined in this submission have the meaning ascribed to them in the Offeror's application.

2. The purpose of the stay would be to permit Sears Canada to hold a meeting of shareholders to approve the SAT prior to November 15, 2006, in accordance with the Support Agreements.

3. We have reviewed the application and discussed these matters with both counsel for the Offerors and counsel for Hawkeye Capital Management, LLC, Knott Partners Management, LLC, and Pershing Square Capital Management, L.P. This submission indicates our views at this stage of the proceedings and the basis for those views.

RECOMMENDATION

4. We are prepared to recommend that the stay be granted if:

   (a) Sears Holdings represents to the Commission that the failure to hold a meeting of Sears Canada shareholders prior to November 15, 2006 would constitute substantial non-performance of the Support Agreements thereby entitling the Bank of Nova Scotia, the Royal Bank of Canada and Scotia Capital (collectively,

the **Banks**) to treat their respective Support Agreements as terminated; and

(b) the information circular prepared for the Meeting (the **Circular**) contains:

(i) the disclosure required by paragraph 4 of the Cease Trade Order; and

(ii) full, true and plain disclosure about the Cease Trade Order, the Stay, the status of the Offer and the various levels of minority approval that may be required.

ANALYSIS

5. We believe that holding the Meeting to approve the SAT would clearly violate both the letter and the spirit of the Cease Trade Order. In our view, preparing for and holding the Meeting must clearly constitute acts in furtherance of a trade.

6. In its order dated August 29, 2006, the Commission noted that it was in the public interest to stay the Cease Trade Order to permit the extension of the Offer to allow Sears Holdings to preserve its rights pending the outcome of the appellate process.

7. In *Re Marchment & Mackay Ltd*. the Commission considered the granting of a stay pending an appeal to the Divisional Court. The Commission adopted the three stage test set out in *RJR-Macdonald Inc*. v. *Canada (Attorney-General)* (1994), 111 D.L.R. (4th) 385 at 400 (S.C.C.):

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in the case
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> *Re Marchment & Mackay Ltd*., (1999), 22 OSCB 7659 at 7660

8. In staff's view, the requested stay should be granted only if it is necessary to preserve the Offerors' appellate rights and if it is not otherwise contrary to the public interest.

Is A Stay Necessary to Preserve the Offerors' Appellate Rights?

9. If the Support Agreements were terminated as a result of the failure to hold the Meeting prior to November 15, 2006, it is reasonable to conclude that the Offeror's appellate rights would be jeopardized. After all, but for the Cease Trade Order, the Offerors could rely upon the Banks support for the SAT in accordance with the Support Agreements. If the Cease Trade Order was overturned by an appellate court, it would only be fair to

return the Offerors to the position they occupied immediately prior to the Cease Trade Order being granted. However, if the Support Agreements terminated as a result of the delays inherent in the appellate process, this would not be possible.

10. It is not clear that the failure to hold the Meeting prior to November 15, 2006 would result in the termination of the Support Agreements. Section 5.2 of the Support Agreements contains a covenant of Sears Holdings that it will cause the meeting of the Sears Canada shareholders to vote on the SAT to be held, and any required final court approval of the SAT to be obtained, prior to November 15, 2006 (the **Covenant**). However, the termination provisions contained in section 6 of the Support Agreements provide only that the Support Agreement shall terminate upon the earliest of (a) the agreement in writing of the parties, and (b) the "Effective Date", being the date that the SAT is implemented.

11. Nevertheless, the Covenant appears to go to the heart of Sears Holdings' obligations under the Support Agreements. Consequently, the failure to comply with the Covenant could, as a matter of contract law, release the Banks from their obligations under the Support Agreements.

12. Given the uncertainty, we would expect Sears Holdings to unequivocally represent to the Commission that a breach of the Covenant by Holdings would constitute a termination of the Support Agreements. In such a case, staff would have sufficient comfort that the stay is necessary. In the absence of this representation, the stay would not appear to be justified.

Is the Stay Otherwise be Contrary to the Public Interest?

13. It would be highly unusual to for an issuer to obtain shareholder approval of a SAT in the circumstances of the present case. As a result, staff has been concerned that the conduct of the Meeting may result in confusion amongst the shareholders of Sears Canada and the marketplace, generally. However, upon reflection, we believe that such confusion could be minimized through appropriate disclosure in the Circular. In our view, appropriate disclosure would include:

    (a) the disclosure required by paragraph 4 of the Cease Trade Order; and

    (b) full, true and plain disclosure about the Cease Trade Order, the stay, the status of the Offer, and the various levels of minority approval that may be required.

14. Although the risk of confusion cannot be entirely eliminated, we believe that the risk is minimal and therefore justifiable to preserve the Offerors' appellate rights.

15. The disclosure required by paragraph 4 of the Cease Trade Order would be necessary in the unlikely event that, notwithstanding the exclusion of the votes cast by the Banks, the SAT is approved by a majority of the minority shareholders of Sears Canada.

ALL OF WHICH IS REPSECTFULLY SUBMITTED

"Naizam Kanji"

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Naizam Kanji,
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