



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SEARS HOLDINGS CORPORATION)
STOCKHOLDER AND DERIVATIVE)
LITIGATION) **CONSOLIDATED**
) **C.A. No. 11081-VCL**
) **Public Redacted Version**
) **Filed July 19, 2016**
)

**VERIFIED CONSOLIDATED AMENDED STOCKHOLDER
DERIVATIVE COMPLAINT**

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Plaintiffs Ryan Flanagan, Jacob Rossof, John Solak, and Shiva Stein ("Plaintiffs"), by and through their undersigned counsel, bring this action derivatively on behalf of nominal defendant Sears Holdings Corporation ("SHLD" or the "Company") against Edward S. Lampert ("Lampert"), Steven T. Mnuchin ("Mnuchin"), Thomas J. Tisch ("Tisch"), Cesar L. Alvarez ("Alvarez"), Ann N. Reese ("Reese"), Kunal S. Kamlani ("Kamlani"), William C. Kunkler, III ("Kunkler"), and Paul G. DePodesta ("DePodesta") (the "Director Defendants"), ESL Investments, Inc. ("ESL"), Fairholme Funds, Inc. ("Fairholme Funds"), Fairholme Capital Management, LLC ("Fairholme Capital"), and Seritage Growth Properties ("Seritage" and collectively with all others, the "Defendants"). The following allegations are based upon the investigation of Plaintiffs' counsel, including the review of publicly available information, and documents produced by SHLD pursuant to 8 Del. C. §220, and through expedited discovery.¹ SHLD also produced approximately 40,000 additional pages of documents after the parties agreed to a temporary stay of this proceeding.²

¹ After filing his Complaint on May 29, 2015, plaintiff John Solak, through counsel, negotiated a production of core documents with counsel for SHLD and the Director Defendants. Defendants' production included SHLD Board of Directors' (the "Board") minutes and presentations relating to the Seritage Transaction (as defined herein), among other things.

² On January 7, 2016, the Court entered a Stipulation and Order Staying Litigation (Trans. ID 58390359), and extended the stay of litigation for an additional period by Order on March 27, 2016 (Trans. ID 58768749). This case is now proceeding

I. INTRODUCTION

1. This action arises out of SHLD's agreement to spin off 235 of its most valuable real estate properties to Seritage, a newly formed real estate investment trust ("REIT"), at an artificially low value of \$2.25 billion in a sale-leaseback transaction (the "Seritage Transaction") that gave control over the REIT to Lampert, SHLD's Chairman, Chief Executive Officer ("CEO"), and controlling stockholder. As part of the Seritage Transaction, SHLD also transferred to Seritage a 50% interest in thirty-one joint venture properties for an additional \$450 million. The SHLD Board approved the Seritage Transaction on June 5, 2015.

2. In connection with the transfer of the 235 properties to Seritage, SHLD entered into a master lease agreement (the "Master Lease"), that names SHLD as tenant and Seritage Growth Properties, L.P. (the "Operating Partnership") as landlord. The Master Lease contains terms that the Board acknowledged are

 "

Most notably, the Operating Partnership has the right to "recapture" certain properties and evict SHLD in order to re-let the leased space to other tenants who can afford to pay a higher rent. The Operating Partnership maintains this recapture

pursuant to an amended scheduling Order which the Court entered on June 29, 2016 (Trans. ID 59207295).

privilege for 100% of the space leased to SHLD at twenty-one "Type I" properties, and for 50% of the space leased to SHLD at 202 "Type II" Properties.³

3. At all relevant times, Lampert was SHLD's Chairman, CEO, and controlling stockholder. Lampert is Chairman of Seritage's board of trustees and a 43.5% owner (with ESL, Lampert's hedge fund) of the Operating Partnership. Thus, Lampert stood on both sides of the Seritage Transaction.

4. The \$2.25 billion Seritage paid for SHLD's properties was well below market value. According to a March 2014 appraisal report prepared by Duff & Phelps, LLP ("Duff & Phelps"), the conflicted financial advisor who was retained by [REDACTED], the total value of the 235 properties transferred (excluding the joint venture properties) was [REDACTED], nearly [REDACTED] more than the \$2.25 billion price paid by Seritage to acquire the properties in 2015. Duff & Phelps' fairness opinion was based on property valuations prepared by Cushman & Wakefield, Inc. ("Cushman & Wakefield") that were materially inadequate. Among other deficiencies, Cushman & Wakefield: (i) failed to adequately account for the value of Seritage's recapture privileges and its right to redevelop excess land; (ii) relied on improperly low "market" rental rates

³ Even for the Type II properties, however, the Operating Partnership may recapture and redevelop any automotive center or other store "appendage" as well as any outparcel or out lot (such as a coffee shop or chain restaurant) and certain parking lots or common areas.

and improperly high capitalization rates (a projected rate of return based on expected income from a property); and (iii) applied inappropriate "big box" market rental rates to smaller appendage properties (such as Sears Automotive Centers) that typically command a markedly higher rent.

5. Despite the inherent conflicts of interest in the Seritage Transaction, the Board, which Lampert stacked with insiders, employees, and old friends, failed to take appropriate steps to ensure the fairness of the Seritage Transaction to the Company. While the Board created a subcommittee of three directors to evaluate related-party transactions (the "Related Party Transactions Subcommittee" or "Subcommittee"), this Subcommittee played no meaningful role in negotiating, or even adequately discussing, the one-sided terms of the Seritage Transaction and the Master Lease. The Board [REDACTED] [REDACTED] yet it failed fully explore alternative transactions that could have raised capital or achieved other Company objectives without selling SHLD's real estate at a discount and providing Seritage with broad discretionary recapture rights.

6. The Seritage Transaction was financed primarily through a rights offering that favored Lampert and Fairholme Capital (SHLD's second largest

stockholder) over other SHLD stockholders.⁴ The rights offering included three types of shares—Class A shares, B shares, and C shares. The purpose for the discrete classes of stock was to allow ESL and Fairholme Capital to acquire a stake in, and increased control over, Seritage beyond the 9.6% limit for ownership in a REIT.⁵ At the time of the Seritage Transaction, half the members of the Board were affiliated with either ESL or Fairholme Capital.

7. By implementing the Seritage Transaction, Lampert has abused his control over SHLD and leveraged its weakened financial condition to acquire over \$2 billion in SHLD's real estate assets on terms that confer a disproportionate benefit on him and his affiliates at the expense of SHLD.

8. As a result of the Seritage Transaction, the value of SHLD stock has steadily declined, from \$42.15 per share just before the announcement of the Seritage Transaction to \$14.48 per share as of July 11, 2016. Conversely, the

⁴ In connection with the rights offering, Seritage filed a Registration Statement on Form S-11 (the "Form S-11") with the U.S. Securities and Exchange Commission (the "SEC") on April 11, 2015. The initial version of the Form S-11 contained no information concerning the fairness opinion or any property appraisals of SHLD's real estate. Seritage only included Duff & Phelps' fairness opinion and information in subsequent amendments after plaintiff John Solak filed his Complaint on May 29, 2015.

⁵ At the time of the Seritage Transaction, Lampert and Fairholme Capital collectively controlled more than 80% of SHLD's common stock.

value of Seritage's stock has increased as the market has absorbed the benefits to Seritage of the Seritage Transaction.

9. By approving the Seritage Transaction on terms that benefited Lampert and his affiliated entities at the expense of SHLD, the Director Defendants and controlling stockholder ESL breached their fiduciary duties to SHLD and its other stockholders, and Seritage, Fairholme Funds, and Fairholme Capital aided and abetted those breaches.

10. The entire fairness standard applies to the Seritage Transaction because Lampert stood on both sides of the transaction. Because the Seritage Transaction was conducted through an unfair process and resulted in an unfair price, Defendants cannot demonstrate the entire fairness of the Seritage Transaction.

11. Plaintiffs have filed this action on behalf of SHLD, seeking damages for the harm attributable to the Seritage Transaction.

II. PARTIES

A. Plaintiffs

12. Plaintiff Ryan Flanagan is a current SHLD stockholder and has continuously held SHLD common stock since February 28, 2013.

13. Plaintiff Jacob Rossof is a current SHLD stockholder and has continuously held shares of SHLD common stock since November 14, 2007.

14. Plaintiff John Solak is a current SHLD stockholder and has continuously held SHLD common stock since January 7, 2015.

15. Plaintiff Shiva Stein is a current SHLD stockholder and has continuously held SHLD common stock since June 14, 2014.

B. Defendants

1. Nominal Defendant SHLD

16. Nominal defendant SHLD is a Delaware corporation headquartered at 3333 Beverly Road, Hoffman Estates, Illinois. SHLD is the parent company of Kmart Holding Corporation ("Kmart") and Sears, Roebuck & Co. ("Sears"). SHLD was formed in 2004 when Kmart and Sears merged. In its Annual Report for the fiscal year ending January 31, 2015, SHLD described itself as "an integrated retailer with significant physical and intangible assets" that "operate[s] a national network of stores with 1,725 full-line and specialty stores in the United States...." SHLD has a market capitalization of approximately \$1.45 billion, and its stock trades on the NASDAQ stock market under the ticker symbol "SHLD."

17. As of April 1, 2016, Lampert and his affiliated entities, including ESL, own 54.6% of SHLD's common stock, while Fairholme Capital owns 25%. When the Board approved the Seritage Transaction on June 5, 2015, Lampert and his related entities owned 53.2% and Fairholme Capital owned 24.7% of SHLD's common stock.

2. Director Defendants

18. Defendant Lampert, in addition to controlling a majority of SHLD common stock, has been Chairman of SHLD's Board since March 2005. Lampert is also SHLD's CEO, a position he assumed in February 2013, although he exercised control over SHLD before then as its Chairman. Lampert is the Chair of SHLD's Finance Committee, which is responsible for "making investment decisions, establishment of policies and oversight decisions in respect of asset dispositions by the Company, and oversight of the Company's relationships with and significant decisions respecting its sources of external finance, including senior lenders...." Lampert is the Chairman and CEO of ESL, the hedge fund he founded in April 1988, and that SHLD acknowledges he "directly controls." Lampert is also the Chairman of Seritage's six-member board of trustees. Lampert and ESL own approximately 43.5% of Seritage's Operating Partnership, which holds title to Seritage's real estate assets, which consist entirely of the properties it acquired from SHLD in the Seritage Transaction.

19. Defendant Mnuchin has been a director of SHLD since March 2005. Mnuchin is a member of the Finance Committee and Chairs the Nominating and Corporate Governance Committee. Mnuchin was ESL's Vice-Chairman from December 2002 to August 2003 and currently serves on ESL's board of directors. Mnuchin is also a current investor in ESL. According to SHLD's February 18,

2005 prospectus, Mnuchin is a "limited partner . . . in one of the ESL Companies and another affiliate of ESL Investments, Inc." Mnuchin served as a director of Kmart from May 2003 until the Kmart-Sears merger in March 2005. Mnuchin was Lampert's college roommate at Yale University in the early 1980s, and the two also worked at Goldman, Sachs & Co. ("Goldman Sachs") in the 1980s.

20. Defendant Tisch has been a director of SHLD since March 2005. Tisch was a director of Kmart from May 2003 until the Kmart-Sears merger in March 2005. Tisch is a member of the Audit Committee and Chairs the Compensation Committee at SHLD. Tisch and his family, the owners of the Loews Corporation, are closely connected to Lampert and ESL. According to internal SHLD documents, Tisch is also [REDACTED] Tisch is also connected to Lampert through Thomas M. Steinberg, who was president of Tisch Family Interests for twenty-two years and is now, with Lampert, a member of Seritage's board of trustees. As of April 1, 2016, Tisch owns approximately 4.1% of SHLD common stock. When the Board approved the Seritage Transaction on June 5, 2015, Tisch owned approximately 4.2% of SHLD common stock.

21. Defendant Alvarez has been a director of SHLD since December 2013. Alvarez is a member of the Nominating and Corporate Governance Committee. Alvarez is also a director of Fairholme Funds, which is Fairholme Capital's parent company. Alvarez is a stockholder and Senior Chairman of

Greenberg Traurig, LLP ("Greenberg Traurig"), which counts SHLD, ESL, and Lampert among its clients.

22. Defendant Reese, like Mnuchin, was appointed to Kmart's board of directors when it emerged from bankruptcy in 2003, and was then placed on SHLD's Board in 2005. Reese chairs the Audit Committee and serves on the Compensation Committee and the Related Party Transactions Subcommittee.

23. Defendant Kamalani has been a director of SHLD since December 2014. Kamalani is a member of the Audit Committee, the Finance Committee, and the Related Party Transactions Subcommittee. In March 2016, Kamalani was appointed President of ESL.

24. Defendant Kunkler has been a director of SHLD since September 2009. Kunkler serves on the Audit Committee, the Finance Committee, and the Related Party Transactions Subcommittee.

25. Defendant DePodesta has been a director of SHLD since December 2012. DePodesta serves on the Compensation Committee and the Nominating and Corporate Governance Committee.

3. Defendant ESL

26. Defendant ESL is a hedge fund that Lampert founded in 1988 and has directly controlled at all times relevant to this lawsuit. ESL specializes in identifying and capitalizing on distressed securities, and has over \$2.8 billion in

assets under management. ESL maintains its principal place of business in Bay Harbor Islands, Florida.

27. Defendant ESL operates as an investment advisor that manages assets in one master fund, ESL Partners, LP. ESL's general partner, RBS Partners, LP ("RBS Partners"), is wholly owned and controlled by Lampert. Through RBS Partners, ESL controls in excess of twenty-seven million SHLD shares, representing approximately 26% of SHLD's outstanding stock. SHLD, along with Lands' End, Inc. ("Lands' End"), Sears Canada, Inc. ("Sears Canada"), and Sears Hometown Outlets (all SHLD spinoffs), comprised roughly 68% of ESL's investment portfolio as of August 14, 2015.

28. In combination with Lampert and ESL's related entities, ESL owns 54.6% of SHLD's common stock, making both ESL and Lampert controlling stockholders of SHLD. When the Board approved the Seritage Transaction on June 5, 2015, ESL, Lampert and ESL's related entities held 53.2% of SHLD common stock. As a result of the rights offering, ESL and Lampert own approximately 43.5% of the Operating Partnership, which acquired and holds the properties divested by SHLD in the Seritage Transaction. ESL and Lampert are the sole limited partners of the Operating Partnership and Seritage itself is the sole general partner. The Operating Partnership manages Seritage's day-to-day activities and holds title to all of its real estate.

4. Defendants Fairholme Funds and Fairholme Capital

29. Defendant Fairholme Funds, founded in 1999, is an investment company that manages three mutual funds that collectively have over 10.9% of their value in SHLD stock. Two of these funds, the Fairholme Focused Income Fund and the Fairholme Allocation Fund, each hold over 30% of their respective values in SHLD stock, comprising each fund's largest investment. Alvarez is a member of Fairholme Funds' board of directors. Bruce R. Berkowitz ("Berkowitz"), a current SHLD director who joined the SHLD Board after the Seritage Transaction, is the President and a director of Fairholme Funds. According to Fairholme Funds' Certified Shareholder Report of Registered Management Investment Companies dated May 31, 2015, Berkowitz has a "significant personal stake" in Fairholme Funds' mutual funds. Berkowitz also personally owns approximately 36,000 shares of Seritage.

30. Defendant Fairholme Capital is the investment advisor to Fairholme Funds and is SHLD's second largest stockholder. Fairholme Capital currently holds 26.6 million shares of SHLD's common stock, which represents approximately 25% of all outstanding shares. Fairholme Capital is a subsidiary of Fairholme Funds.

5. Defendant Seritage

31. Defendant Seritage is a REIT that was organized on December 18, 2014, under Maryland law and has its principal executive offices in New York, New York. SHLD formed Seritage in order to carry out the Seritage Transaction. Until at least July 10, 2015, Seritage maintained its principal place of business at SHLD's corporate headquarters in Hoffman Estates, Illinois.

32. Defendant Seritage is a publicly traded, self-administered, and self-managed REIT that is primarily engaged in the real property business. Seritage's real estate portfolio consists of the 235 properties and thirty-one joint venture interests it acquired from SHLD in the Seritage Transaction, which collectively amounts to approximately forty-two million square feet of retail space. Seritage earns revenue primarily by leasing these properties to SHLD, under the terms of the Master Lease, for the operation of SHLD's retail stores.

33. Lampert, ESL, and Fairholme Capital control Seritage. Lampert serves as Chairman of Seritage's board of trustees and controls 9.6% of Seritage's voting power. Pursuant to the rights offering, ESL purchased all the Class B shares of Seritage, and Fairholme Capital purchased all the Class C shares of Seritage. Certain Fairholme Capital clients were granted the unique ability to purchase more Class A shares than other SHLD stockholders, which increased Fairholme Capital's voting power and economic interest in Seritage. Seritage

conducts its operations through the Operating Partnership, a Delaware limited partnership that holds title to all of Seritage's real estate and manages its day-to-day activities.

III. DERIVATIVE ALLEGATIONS

34. Plaintiffs bring this action derivatively to redress injuries to SHLD resulting from the Defendants' breaches of fiduciary duties and to prevent further injuries.

35. Plaintiffs owned SHLD stock during the time of the wrongful course of conduct constituting the basis for the claims asserted herein and continue to hold the stock.

36. Plaintiffs will adequately and fairly represent the interests of SHLD and its stockholders in prosecuting and enforcing SHLD's and its stockholders' rights, and have retained counsel competent and experienced in stockholder derivative litigation.

IV. JURISDICTION

37. This Court has jurisdiction over this action under 10 Del. C. §341.

38. This Court has jurisdiction over the Director Defendants as the directors and officers of a Delaware corporation under 10 Del. C. §3114 and under 10 Del. C. §3104.

39. This Court has jurisdiction over defendants Seritage, Fairholme Funds, and Fairholme Capital under 10 Del. C. §3104.

40. This Court has jurisdiction over nominal defendant SHLD and defendant ESL under 10 Del. C. §3111.

V. BACKGROUND LEADING TO THE SERITAGE TRANSACTION

A. Lampert Acquires Control Over SHLD

41. SHLD was formed in 2004 in connection with the March 24, 2005 merger of Sears and Kmart. Prior to the merger, Lampert was Chairman of Kmart's board of directors and owned nearly 53% of Kmart's stock. At that time, he was also Sears' largest stockholder, owning 15% of Sears' stock. As a result of the merger, in which Kmart paid \$11.5 billion to acquire Sears, SHLD became the third largest retailer in the U.S.

42. Lampert acquired his holdings in Kmart through Kmart's Chapter 11 bankruptcy. In the early 2000s, Kmart struggled financially due to sales that lagged well behind Wal-Mart and Target. After Kmart filed for bankruptcy protection in January 2002, Lampert began acquiring substantial amounts of Kmart's debt. One of the main reasons Lampert decided to invest so heavily in Kmart was the high value of its real estate holdings.

43. Lampert and ESL controlled SHLD's operations from its formation.

In its registration statement filed with the SEC on December 2, 2004, SHLD made the following disclosures:

- "Mr. Lampert directly controls ESL Investment Management, L.L.C."
- "[T]he ESL Companies, and thus Mr. Lampert, would have substantial influence over many if not all actions to be taken by [SHLD's] stockholders after the mergers, including the election of the directors to the [SHLD] board and transactions involving a change of control. This substantial influence may have the effect of discouraging offers to acquire [SHLD] because the consummation of any such transaction would likely require the consent of the ESL Companies."
- "The interests of ESL Companies, which have investments in other companies, may from time to time diverge from the interests of other [SHLD] stockholders, particularly with regard to new investment opportunities."

44. Under the terms of the Sears-Kmart merger, Lampert—who owned 41% of SHLD's stock after the merger—was appointed Chairman of SHLD's Board. Six of the directors who previously served on Kmart's board of directors with him were also placed on the Board, including Mnuchin, Reese, and Tisch.

45. Lampert placed a number of ESL's officers and employees in key positions within SHLD. SHLD's Senior Vice President of Real Estate from 2006 to 2012 was an employee of ESL. Additionally, from 2006 to 2012, William R. Harker held numerous positions at SHLD, including Senior Vice President, General Counsel, Corporate Secretary, and Senior Vice President of Human

Resources, while also serving as ESL's Executive Vice President and General Counsel. Similarly, between 2005 and 2011, William C. Crowley held positions at SHLD that included Executive Vice President, Chief Administrative Officer, and Chief Financial Officer ("CFO"). From 1999 through 2011, Mr. Crowley also served as ESL's President and Chief Operating Officer. In March 2016, Lampert also appointed SHLD director Kamlani to serve as President of ESL. Kamlani is a member of SHLD's Related Party Transactions Subcommittee, and in that capacity recommended that the Board approve the Seritage Transaction and voted in favor of the Seritage Transaction.

46. In February 2013, following the tenure of four CEOs who lacked retail experience, and despite the growing financial difficulties SHLD faced under Lampert's leadership and control, SHLD appointed him as its CEO. At the time, Lampert and his controlled entities owned 55% of SHLD's common stock.

47. Because Lampert and his affiliated entities hold 54.6% of SHLD stock, he is a majority stockholder and has the power under both Delaware law and SHLD's By-Laws to remove members of SHLD's Board "with or without cause." Lampert and ESL also maintain substantial influence over SHLD as they held a substantial portion of SHLD's debt leading up to the Seritage Transaction. As of

January 31, 2015, Lampert and ESL held \$507 million in secured and unsecured notes.⁶

B. SHLD Sustains Consistent and Substantial Financial Losses Under Lampert's Leadership

48. Leading up to the Seritage Transaction, SHLD's financial performance suffered under Lampert's direction and control. As shown in the table below, from 2006 through 2015, SHLD's net income dropped by a combined \$9.6 billion and its total annual revenue declined by approximately \$27.9 billion:

Year	Net Income (Loss)	Total Revenues
2006	\$1.49 billion	\$53 billion
2007	\$812 million	\$49.8 billion
2008	\$295 million	\$46 billion
2009	\$218 million	\$43.4 billion
2010	\$122 million	\$42.7 billion
2011	(\$3.1 billion)	\$41.6 billion
2012	(\$930 million)	\$39.9 billion
2013	(\$1.4 billion)	\$36.2 billion
2014	(\$1.7 billion)	\$31.2 billion
2015	(\$1.1 billion)	\$25.1 billion

49. SHLD's history of poor performance is a function of Lampert's mismanagement of the Company, including the failure to invest in improvements to retail operations to keep pace with peer retailers like Target and Wal-Mart.

⁶ Fairholme Capital and its affiliates were also large SHLD debtholders during the relevant time period.

C. SHLD Closes Hundreds of Stores

50. The Board and SHLD management have publicly and consistently expressed their confidence in and commitment to SHLD's future as a retail organization. However, SHLD has not taken action consistent with such statements.

51. Starting in 2014, Lampert has used his influence over SHLD to enter into a series of self-dealing transactions that have divested SHLD's core assets but benefited Lampert and his affiliated entities, as well as Fairholme Capital. Specifically, the Board approved the divestiture of certain of SHLD's assets, including its Lands' End and Sears Canada businesses, after which ESL maintained substantial holdings in and control over the entities.

52. On December 4, 2014, following the Lands' End spinoff and the rights offering involving Sears Canada, SHLD announced that it had closed or planned to close 235 stores. As of June 2016, SHLD only operates approximately 1,670 stores in the United States, and has announced plans to close an additional seventy-eight stores by the end of July. As the following table demonstrates, SHLD's retail operations have rapidly declined from the 3,555 stores it operated in 2010:

Year	Total Stores in Operation
2010	3,555
2011	3,510

Year	Total Stores in Operation
2012	2,073
2013	1,980
2014	1,725
2015	1,702
June 2016	1,670

53. In light of SHLD's reduced retail operations and continued refusal to invest in retail, there is growing consensus among retail industry analysts that the Company is likely to seek bankruptcy protection.

VI. THE SERITAGE TRANSACTION

A. Lampert Controlled the Board's Decision to Approve the Seritage Transaction

54. The Seritage Transaction is part of Lampert's ongoing strategy to strip SHLD of its valuable core assets. SHLD Board minutes confirm that Lampert was the driving force behind the Seritage Transaction. On September 21, 2014, Lampert addressed the Board and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

55. On November 19, 2014, SHLD CFO Robert A. Schriesheim ("Schriesheim") addressed the Board and explained that SHLD was [REDACTED]

[REDACTED]

[REDACTED] The CFO [REDACTED]

[REDACTED]

He further explained that the [REDACTED]

[REDACTED]

[REDACTED]

56. On December 3, 2014, Schriesheim further explained to the Board

[REDACTED]

[REDACTED]

[REDACTED]

57. On January 20 and 21, 2015, a representative of Duff & Phelps addressed the Board [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] He noted [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

58. On March 5, 2015, the Board met to receive further information regarding the Seritage Transaction. At this meeting, CFO Schriesheim [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] At the time, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Further, [REDACTED]

[REDACTED]

59. At this meeting, CFO Schriesheim [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

60. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] However, there is no indication that the Board fully explored these options that were available to the Company that did not involve selling the Company's most valuable real estate assets [REDACTED]

61. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

At this meeting, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As Schriesheim explained:

[REDACTED]

[REDACTED]

62. During the same meeting, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

63. At the March 5, 2015 Board meeting, SHLD's President of Real Estate explained that [REDACTED]

[REDACTED] Materials distributed in connection with the meeting explained [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

64. By eliminating from the Seritage Transaction stores that were [REDACTED] and further eliminating stores with [REDACTED]

[REDACTED] SHLD was left with stores that are underperforming and difficult to be redevelop.

65. The Board was also advised at the March 5, 2015 meeting about Seritage's broad discretionary recapture rights. Under the terms of the Master Lease, Seritage's Operating Partnership would have sole discretion to exercise Seritage's recapture privileges and evict SHLD (subject to the payment of certain costs and expenses) in order to re-let the property to higher-paying tenants. As stated in the Board presentation materials, [REDACTED]

[REDACTED]

[REDACTED]

66. The Board was aware that the broad recapture provisions would likely be detrimental to SHLD. As stated in the minutes, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Board was advised at the March 5, 2015 meeting that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

67. In addition to the recapture rights which provided Seritage the benefit to discretionarily evict SHLD, the Board was advised [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Conversely, however,

the Master Lease contains no restrictions to whom Seritage may sell or lease recaptured space, so it could be sold or leased to a competitor of SHLD. Seritage would also have the power to terminate the Master Lease on ten days' notice if there is an event of default, which is defined to include a tenant being ten days late with a rental payment. In contrast, if SHLD desires to exercise an early termination option for an underperforming store, SHLD must pay a penalty equivalent to one full year's rent and other occupancy costs like maintenance expenses, taxes, and insurance.

68. Despite the numerous terms which were highly unfavorable to SHLD and benefited Lampert and Seritage, the Related Party Transactions Subcommittee was not actively engaged in the process and instead let the entire process be driven by Lampert, who was singularly focused on getting a deal done and negotiating terms that were preferential to Seritage.

69. On March 26, 2015, the Board approved a joint venture with General Growth Properties, Inc., by which SHLD would obtain a 50% interest in the joint venture "to be sold to the REIT" in connection with what would become the Seritage Transaction. The Board also authorized the rights offering, and further authorized the filing of the Form S-11 "on behalf of the Corporation and/or REIT, as applicable."

70. On June 5, 2015, the Board held a telephonic meeting, at which Duff & Phelps presented its fairness opinion to the Board and the Board ultimately approved the Seritage Transaction. At this meeting, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷

⁷ Duff & Phelps did not value the three joint ventures independently purportedly [REDACTED]

71.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

72. Prior to approving the Seritage Transaction, the Board never sought unaffiliated stockholder approval of the Seritage Transaction to ensure that the value received by the Company was fair.

73. On June 9, 2015, SHLD and Seritage jointly announced the final terms of the Seritage Transaction. As a result of the Seritage Transaction, SHLD sold 235 Sears and Kmart store locations, and its one-half interest in thirty-one additional joint venture properties, to Seritage for a total of \$2.7 billion. Of the total, \$2.25 billion was attributed to the 235 properties and the remainder was attributed to the joint venture interests. All of the properties are now owned by Seritage's Operating Partnership, in which Lampert and ESL have a 43.5% interest.

74. That same day, SHLD's share value dropped by almost 19.5%, even though both the NASDAQ and Standard & Poor's 500 indices were up by over 1%. By the following day, SHLD's stock had declined in value by more than 22%, from \$38.50 to \$29.73 per share. The next day, a *Bloomberg* reporter observed that SHLD's shares "tumbled for a fifth straight day, hurt by concerns that selling a chunk of its stores will leave less value for investors."

75. SHLD stock has continued to decline in value, and was trading at \$13.34 as of June 29, 2016. According to *Fortune*, "[t]he company is still trying to outrun the proverbial melting ice cube ... [b]ut it has only so many assets left to sell to keep pulling off that trick." An expert in distressed retail companies told

Business Insider that "Sears isn't trying to get better," and said that "[i]t's hard to imagine them ever being a destination retailer." *Seeking Alpha* has predicted that SHLD will file for bankruptcy because Lampert no longer needs it to be in operation now that Seritage can lease the retail properties to other companies:

[T]he transaction is solely designed to serve the purposes of Eddie Lampert. Sears will not only be losing assets in the transaction, it will be left with a higher operating cost structure through the lease agreement and will rapidly burn through the cash raised in the transaction. Then, Seritage will begin to recapture the leases from the unprofitable Sears stores. Following this, the REIT will be able to generate its income from third-party sources and Sears will no longer be needed. Since Lampert no longer needs Sears to be in operation to meet the needs of the REIT, the company will file for bankruptcy.

76. If these analysts are correct, Lampert has acquired control over SHLD's valuable real estate assets in anticipation of an eventual bankruptcy filing. According to Seritage's quarterly report for the quarter ended June 30, 2015, Lampert and ESL paid approximately \$715.1 million for their 43.5% stake in Seritage's Operating Partnership, which controlled real estate assets valued at nearly \$2.7 billion.

77. While SHLD may be facing bankruptcy, Seritage has increased in value and attracted sophisticated investors because of the properties it obtained in the Seritage Transaction and the terms of the Master Lease which favor Seritage.⁸

⁸ In December 2015, Warren Buffett disclosed an 8% interest in Seritage; that same day Seritage common stock rose 17%. According to Gillian Tan of *Bloomberg*, "[t]he likely attraction for Buffett was that [Seritage] has the right to recapture

Seritage has been aggressively exercising its recapture privileges and, as of May 5, 2016, now receives 27% of its annual rental income from non-SHLD tenants. As of May 2016, Seritage has eighteen redevelopment projects underway, including several redevelopments of former Sears Auto Center parcels into retail centers and restaurant space. As alleged herein, these parcels were particularly undervalued in the Seritage Transaction because Cushman & Wakefield improperly attributed "big box" rents to these smaller parcels that typically command a much higher market rent.

B. The Seritage Transaction Was Not Entirely Fair

78. The price and other terms of the Seritage Transaction were not fair to SHLD and its stockholders for several reasons, including: (i) SHLD sold a substantial portion of its most valuable retail properties for an unfair price below market value; (ii) the Master Lease contains terms that are extremely favorable to Seritage and not adequately reflected in the purchase price; (iii) Seritage's ownership structure allows Lampert to control the transferred properties; and (iv) the Master Lease contains terms that are detrimental to SHLD and permits and encourages Lampert to favor Seritage as landlord over SHLD as tenant in a manner

... the space within those 224 properties and rent it to new tenants on 'potentially superior terms.' An improved tenant roster would allow Seritage to lift its revenue pretty dramatically...."

that will further erode SHLD's current and future revenue prospects, compound its operating losses, and reduce its value and corresponding ability to access the capital markets, among other things.

79. Additionally, the inadequate purchase price resulted from a flawed process by which the SHLD Board approved the Seritage Transaction. The conflicted Board and its Related Party Transactions Subcommittee, among other things: (i) failed to negotiate fair terms for the Seritage Transaction, including the terms of the Master Lease; (ii) favored Lampert's interests above those of SHLD and/or failed to adequately account for Lampert's divided interests; (iii) relied on a conflicted financial advisor, Duff & Phelps, that was retained by [REDACTED] [REDACTED] (iv) bowed to pressure from Lampert to complete the transaction; and (v) failed to follow industry standards or otherwise properly market the transferred properties.

1. SHLD Received an Unfair Price in the Seritage Transaction

80. Seritage paid approximately \$2.25 billion for the 235 retail properties it acquired. This amount is well-below fair value, particularly in light of the Master Lease and Seritage's recapture privileges.

81. One method for determining the value of commercial real estate is the "direct capitalization" methodology, which derives a property's value by dividing its net operating income by a capitalization rate, *i.e.*, a projected rate of return

based on expected income. Net operating income can be derived from market rent based on what other tenants are paying to rent space at comparable properties, or contract rent based on an existing lease. A specific tenant may be able to afford only a low rent because of its specific financial situation. The capitalization rate, however, is itself calculated by dividing the net operating income of comparable properties by the sale prices of those same comparable properties. Once a capitalization rate is determined, it can be compared against those determined in comparable real estate transactions and by reference to national publications.

82. Seritage disclosed in offering materials that it expects to replace SHLD with higher-paying tenants that will generate higher net operating income for itself. Replacing SHLD with higher-paying tenants would increase the value of the acquired properties.

83. Because SHLD's real estate is worth more with more successful retailers occupying the space, in the past, SHLD has been able to sell its real estate in a condition that was either unoccupied or leased to a different tenant (who was paying a higher rent) for a price higher than its value with SHLD in possession. For example, on March 1, 2014, Duff & Phelps conducted an appraisal report that valued each of 1,880 SHLD properties. That report valued SHLD's Cupertino, California, property at [REDACTED]. Yet SHLD was able to sell that property in

October 2014 for \$102.5 million in part because the new occupant, an upscale fitness club, could generate higher net operating income with the same property.

84. Duff & Phelps' fairness opinion, however, was not based on its 2014 appraisals of the 1,880 SHLD properties. Instead, Duff & Phelps relied on Cushman & Wakefield's valuation of each of the transferred properties in light of the Master Lease. Cushman & Wakefield's valuations were approximately [REDACTED] [REDACTED] lower than the earlier Duff & Phelps appraisals for the same properties.

85. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

86. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

87.

[REDACTED]

88.

[REDACTED]

89.

[REDACTED]

90.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

91.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

92.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

93. [REDACTED]

[REDACTED]

94. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. The Unfair Price Was the Result of an Unfair Process

95. In approving the Seritage Transaction, SHLD's Board did not follow a fair process and failed to adequately protect SHLD's interests. Among other things, the Board: (i) relied on a Related Party Transactions Subcommittee that was ineffective and controlled by Lampert; and (ii) retained and relied on a conflicted financial advisor, Duff & Phelps.

a. The Related Party Transactions Subcommittee Was Ineffective

96. In December 2012, the Board's Audit Committee established the Related Party Transactions Subcommittee, consisting of Reese and Kunkler, for the purpose of reviewing potential related party transactions and advising the Board accordingly. Kamalani joined the Subcommittee following his election to the Board in December 2014.

97. The Subcommittee did not function in a manner that adequately protected SHLD's interests. The Subcommittee failed to take an active role in the process and does not appear to have negotiated with Seritage or ESL in any meaningful way. Further, the minutes of Subcommittee meetings [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

98. Additionally, the Subcommittee failed to follow any typical industry protocol for transferring a real estate portfolio of this size, including: (i) retention of an experience national brokerage firm to market the properties; (ii) identification and solicitation of likely potential buyers; and (iii) preparation and distribution of an offering memorandum or other document proposing a transaction. The Subcommittee also never insisted that the purchase price be negotiated by any independent broker or agent of SHLD, or even an independent director.

99. [REDACTED]

[REDACTED] During the telephonic meeting on June 5, 2015, at which the full Board approved that Seritage Transaction, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

100. [REDACTED]

[REDACTED]

101. To the contrary, at the beginning of the June 5, 2015 Board meeting, CFO Schriesheim [REDACTED]

[REDACTED]

[REDACTED] Duff & Phelps performed [REDACTED]

[REDACTED] of a discounted cash flow analysis, a comparable company analysis, and a precedent transaction analysis, to reach a valuation range of between \$2.1 billion and \$2.67 billion for the 235 properties, and between \$2.5 billion and \$3.1 billion inclusive of the values of the joint ventures which [REDACTED]

[REDACTED] Thus, the consideration paid by Seritage appears to have been based upon the Cushman &

Wakefield appraisals, and measured against a range created by Duff & Phelps, without meaningful negotiation by the Subcommittee appointed to serve as a check against Lampert's conflicting interests.

102. The Subcommittee has a history of consistently deferring to Lampert in transactions that benefit Lampert or his affiliated companies. In 2014, the Subcommittee approved, at Lampert's direction, a \$400 million loan from ESL to SHLD that paid ESL \$19 million in interest and fees and was secured with twenty-five SHLD stores valued at \$500 million ("ESL Loan"). Fairholme Partnership, LP, an affiliate of Fairholme Funds, also purchased a 6.25% participation in the ESL Loan.

103. [REDACTED]

[REDACTED] Even though SHLD claimed to need the loan no later than September 15, 2014, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

104. [REDACTED]

[REDACTED]

[REDACTED] he default interest rate remained 5% and ESL's up-front fee was [REDACTED] 1.75% of the principal amount. Accounting for fees and interest payments, Lampert and his affiliates realized approximately \$19 million from the ESL Loan.⁹

105. In the Seritage Transaction, the Subcommittee did not act independently and simply bowed to Lampert's desires in a transaction involving SHLD's real estate assets that was designed to confer a disproportionate benefit on Lampert and his affiliates.

b. The Board Was Improperly Influenced by an External Financial Advisor with a Material Conflict

106. Less than a year after Duff & Phelps completed an appraisal of SHLD's real estate in March 2014, [REDACTED] retained Duff &

⁹ After the ESL Loan was publicly disclosed, SHLD's stock price fell nearly 9%. Market analysts were critical of the ESL Loan, and characterized Lampert's role in the transaction as "shady because there is clearly a conflict of interest" and as "an early step in Lampert's endgame ... first dibs on so-called valuable real estate."

Phelps as a financial advisor to provide a fairness opinion for the Seritage Transaction. As noted in the Board's minutes of January 20 and 21, 2015, Jeff Schiedemeyer, a representative from Duff & Phelps [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A

January 21, 2015 Duff & Phelps presentation to the Board, confirms [REDACTED]

[REDACTED]

[REDACTED]

107. Despite [REDACTED] the presentation materials further state that Duff & Phelps [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

108. Duff & Phelps' [REDACTED]

was a substantial conflict of interest that calls into question the independence of its

fairness opinion. The SHLD Board was fully aware of this conflict of interest, but allowed Duff & Phelps to remain as a financial advisor [REDACTED] and then relied on the conflicted fairness opinion of Duff & Phelps in approving the Seritage Transaction.

109. Duff & Phelps issued its fairness opinion on June 5, 2015. The fairness opinion was included in the Form S-11 filed by Seritage in connection with the rights offering, but does not disclose that Duff & Phelps [REDACTED]

[REDACTED] Duff & Phelps' fairness opinion also states that "a portion of Duff & Phelps' fee is payable upon Duff & Phelps informing [SHLD] that it is prepared to deliver the Opinion." Further, Duff & Phelps had an economic interest in favoring the Seritage Transaction in order to maintain its ongoing relationship with SHLD.

The fairness opinion states that:

[D]uring the two years preceding the date of this Opinion, Duff & Phelps has acted as a financial advisor to Holdings and the Board of Directors in connection with several valuation matters and has rendered financial opinions to the Board of Directors in connection with certain transactions. For these prior engagements, Duff & Phelps received customary fees, expense reimbursement, and indemnification.

110. By reason of [REDACTED] compensation terms, and interest in maintaining a continuing relationship with SHLD, the objectivity of Duff & Phelps' fairness opinion is called into question.

C. The Rights Offering and Allocation of Interests in Seritage Gave Lampert Control Over the Transferred Properties

111. Seritage raised a substantial portion of the \$2.7 billion it needed to purchase the properties through a rights offering to SHLD stockholders. The rights offering included three classes of shares—Class A (common shares), Class B (non-economic shares) and Class C (non-voting shares). Class B and Class C shares were created to allow ESL and Fairholme Capital and its clients, respectively, to acquire greater ownership interests in Seritage than Seritage's declaration of trust otherwise permits. This benefit is unique to ESL and Fairholme Capital. No other SHLD stockholder can ever circumvent this limitation, because ESL's Class B shares and Fairholme Capital's Class C shares convert to Class A upon any transfer to any person or entity unrelated to them.

112. **Class A Shares.** SHLD stockholders other than ESL and Fairholme Capital were only permitted to purchase Class A shares. SHLD stockholders paid approximately \$29.58 per share for their Class A shares. Class A shares have voting rights and pay dividends. Seritage raised approximately \$727,200,000 from the sale of Class A shares. Class A shares are widely-held and publicly traded on the NYSE under the symbol "SRG." 24,776,170 Class A shares were outstanding as of August 12, 2015.

113. In addition to its Class B shares, described below, as of April 2016, ESL holds 975,893 Class A shares, representing 3.9% of Seritage's voting power.

In addition to its Class C shares, described below, as of April 2016, Fairholme Capital owns 13.4% of the Class A shares, representing 12.7% of Seritage's voting power.

114. **Class B Shares.** Only ESL and Lampert were permitted to purchase Class B shares, and they currently own 100% of them. ESL and Lampert paid approximately \$1.77 per share for their Class B shares. Class B shares afford Lampert and ESL a total of 6% of Seritage's voting power, but do not pay dividends. Seritage raised approximately \$900,000 from the sale of Class B shares. 1,589,020 Class B shares were outstanding as of August 12, 2015.

115. Through ownership of Class A and Class B shares, ESL currently controls approximately 9.7% of Seritage's voting power.

116. **Class C Shares.** Only Fairholme Capital and certain of its clients were permitted to purchase Class C shares, and they currently own 100% of them. Fairholme Capital and its clients paid approximately \$30.14 per share for their Class C shares. Class C shares entitle Fairholme Capital and its clients to a total of 21.2% of Seritage's aggregate dividends, but afford no voting rights. Even though Fairholme Capital ultimately did not purchase an interest in the Operating Partnership, the Class C shares offered exclusively to Fairholme Capital allowed it to gain an effective interest in Seritage beyond the limit of 9.6%. Seritage raised

approximately \$200,900,000 from the sale of Class C shares. 6,665,635 Class C shares were outstanding as of August 12, 2015.

117. Following the Seritage Transaction, ESL and Fairholme Capital—through their combined ownership of shares—control nearly 18.7% of Seritage's voting power. Moreover, although Seritage's declaration of trust provides for a 9.6% cap on individual ownership of Seritage shares in order to comply with the Internal Revenue Code's provisions prohibiting excessive concentrated ownership of REIT shares, Seritage granted Fairholme Capital and certain of its clients "excess share waivers" that allow Fairholme Capital or certain of its clients to individually own up to 20% of Seritage's shares. The excess share waivers are memorialized in Seritage's declaration of trust.

118. Seritage also raised \$715.1 million through a private offering by which ESL and Lampert acquired a 43.5% interest in the Operating Partnership, which holds title to Seritage's real estate and controls its day-to-day operations. Seritage owns the remaining 56.5% of the Operating Partnership. Seritage disclosed in its public filings that the private offering was designed to allow ESL and Lampert to "purchase interests in us in excess of the amounts they would otherwise be able to purchase in light of regulatory and tax considerations." Seritage funded the remainder of the purchase price for SHLD's real estate through loans.

119. Pursuant to the partnership agreement, Seritage is the sole general partner of the Operating Partnership, and Lampert and ESL are the sole limited partners. Lampert and ESL are entitled to receive quarterly distributions of certain funds generated by the partnership, as determined by the general partner, proportionate to their 43% ownership interest.

120. Unlike a typical partnership arrangement, however, the partnership agreement gives the limited partners substantial control over the general partner. For example, subject to limited exceptions, the general partner may not conduct any business outside of the partnership or acquire any interest in real or personal property without the consent of the limited partners. Conversely, limited partners may engage in any business activities outside the partnership, "including business interests and activities in direct competition with the Partnership or that are enhanced by the activities of the Partnership."

121. As limited partners in the Operating Partnership, Lampert and ESL have various other rights and benefits that are not shared with other SHLD stockholders. For example, limited partners, unlike stockholders in the Seritage REIT, may avail themselves of significant tax advantages, such as a deduction for any operating partnership losses. Similarly, the partnership could spend large amounts to improve the acquired properties, and depreciate those expenditures at

an accelerated rate, allowing the limited partners favorable tax treatment when calculating their partnership income.

122. As limited partners, Lampert and ESL also have the right, subject to certain conditions, to cause the Operating Partnership to redeem all or a portion of their investment in the partnership. Conversely, stockholders in the Seritage REIT do not have this ability.

123. Subject to narrow exceptions, the terms of the partnership agreement also provide that limited partners have "no liability," while Seritage's liability is not similarly limited.

124. As the sole limited partners, ESL and Lampert also have veto power over certain major transactions including mergers, consolidations, conversions, and other combinations that constitute a "change of control" for Seritage or the Operating Partnership.

125. Lampert also exerts substantial control over Seritage due to his role as Chairman of Seritage's board of trustees. Seritage's trustees serve staggered three-year terms, so only one-third of the trustees are up for election each year. To be elected, trustees must receive a vote of 75% of the Class A and Class B shares entitled to vote. As Seritage disclosed in its SEC filings, ESL and Fairholme Capital have a great deal of control over the vote because the 75% requirement "mak[es] it more difficult for shareholders to elect trustee nominees that do not

receive the votes of shares of beneficial interest held by ESL and/or Fairholme...."

One of Lampert's co-trustees on the Seritage board is Thomas M. Steinberg, who was president of Tisch Family Interests for twenty-two years. Lampert also serves on Seritage's Compensation Committee and Mr. Steinberg serves on its Nominating and Corporate Governance Committee.

126. Seritage summarized Lampert and ESL's substantial influence over both Seritage and SHLD in its quarterly report for the quarter ended June 30, 2015:

ESL beneficially owns approximately 43.5% of the Operating Partnership units, and approximately 4.0% of the outstanding Class A common shares and Class B non-economic shares having, in the aggregate, 9.8% of the voting power of Seritage Growth. ESL also beneficially owns approximately 48% of the outstanding common stock of Sears Holdings (55% including shares issuable upon exercise of warrants held by ESL). In addition, Mr. Lampert, the Chairman of the Board and Chief Executive Officer of Sears Holdings and Chairman and Chief Executive Officer of ESL, serves as the Chairman of the Seritage Growth Board of Trustees. As a result, *ESL and its affiliates have substantial influence over us and Sears Holdings.*

VII. DEMAND ON THE SHLD BOARD IS EXCUSED AS FUTILE

A. Overview of Demand Futility Allegations

127. Plaintiffs assert their claims derivatively to redress injuries suffered, and to be suffered, by the Company directly and proximately caused by Defendants' breaches of fiduciary duty.

128. Plaintiffs will adequately and fairly represent the interests of SHLD in enforcing and prosecuting its rights.

129. The preceding allegations are incorporated herein by reference. Plaintiffs have not made a demand on SHLD's Board to bring suit asserting the claims in this Consolidated Amended Complaint because pre-suit demand would be a useless and futile act or is excused as a matter of law.

130. Demand would be futile or is excused as a matter of law because a majority of SHLD's Board suffered from divided loyalties and disabling conflicts that precluded them from independently and objectively negotiating, evaluating, and approving the Seritage Transaction, and from exercising independent business judgment.

131. SHLD's Board is incapable of objectively considering the claims raised herein and is incapable of acting in an independent and disinterested fashion regarding a demand because it is beholden to Lampert, the Chairman, CEO, and controlling stockholder of SHLD who dominates the Board, controls the operations of the Company, and stood on both sides of the Seritage Transaction.

132. At the time of the filing of Plaintiffs' Consolidated Complaint, on October 15, 2015, SHLD's Board consisted of eight directors: defendants Lampert, Alvarez, DePodesta, Kamlani, Kunkler, Mnuchin, Reese, and Tisch.¹⁰

¹⁰ Plaintiffs' derivative claims were properly brought before the Court when Plaintiffs filed the Consolidated Complaint. Since that time, SHLD has added two directors, Alesia J. Haas and Berkowitz. Berkowitz is also Chief Investment Officer of Fairholme Capital as well as President and a director of Fairholme

133. Demand is futile with regard to Lampert, Alvarez, Mnuchin, Reese, Tisch, and Kamlani because they are each controlled and dominated by and therefore lack independence from interested controlling director Lampert and his affiliated entities (including ESL), and/or Fairholme Funds and Fairholme Capital. As a result, there is reasonable doubt that they could have exercised their impartial business judgment in responding to a demand.

134. Demand is also futile as to Lampert, Alvarez, Mnuchin, Reese, Tisch, and Kamlani because they face a substantial likelihood of personal liability due to breaches of fiduciary duty related to the Seritage Transaction.

135. Demand is futile as to all of the Director Defendants because the Seritage Transaction was not a valid exercise of business judgment or was not entirely fair to SHLD, and the Director Defendants failed to implement sufficient protective devices to safeguard against Lampert and ESL advancing their interests over the interests of disinterested stockholders.

B. Demand on Lampert, Alvarez, Mnuchin, Tisch, Reese, and Kamlani Is Excused Because They Are Not Independent from Controlling Director Lampert and His Affiliated Entities

136. **Defendant Lampert.** Individually and through his controlled affiliates, Lampert controlled 53.2% of SHLD's common stock, and still controls a

Funds. Ms. Haas was previously employed as CFO at OneWest Bank Group LLC ("OneWest Bank"), which was founded by Mnuchin.

majority of SHLD's shares. SHLD disclosed in its annual report for the fiscal year ended February 1, 2014, that "these affiliates, and thus Mr. Lampert, have substantial influence over many, if not all, actions to be taken or approved by our stockholders, including the election of directors and any transactions involving a change of control." By virtue of his and ESL's stock ownership, Lampert controls all matters to be decided by SHLD stockholders.

137. Lampert stood on both sides of the Seritage Transaction. Among other things, Lampert was, and is, Chairman of Seritage's board of trustees and a 43.5% owner (with ESL) of the Operating Partnership that holds title to all Seritage's real estate and controls the day-to-day operations of Seritage. Since Lampert controls ESL, ESL was also on both sides of the Seritage Transaction.

138. Lampert also has control over SHLD and its Board, and has the ability to remove any director who dissents from his views. Article II, Section 3 of SHLD's Amended and Restated By-Laws allows for the removal of directors without cause "in accordance with Delaware Law." Because 8 Del. C. §141(k) empowers majority stockholders to remove members of a board of directors "with or without cause," Lampert can vote out any director who opposes him.

139. Lampert has used his control and influence over the constituency of the Board to fill SHLD's Board with individuals who have a long history of working with him, including Alvarez, Mnuchin, Tisch, and Reese. Pursuit of

these claims would imperil the substantial benefits that accrue to these defendants by reason of their service on the Board and their professional relationships, given Lampert's voting control.

140. **Defendant Alvarez.** In addition to being a director of SHLD, Alvarez is also a director of Fairholme Funds, the parent company of Fairholme Capital. Fairholme Capital owns approximately 25% of SHLD's common stock and is SHLD's second largest stockholder behind Lampert and ESL. According to Seritage's Form S-11, Fairholme Capital and ESL are both parties to special agreements that allow them to "purchase interests ... in excess of the amounts they would otherwise be able to purchase in light of regulatory and tax considerations...." By virtue of his position on Fairholme Funds' board of directors, Alvarez, like Lampert, stood on both sides of the Seritage Transaction.

141. As SHLD's largest stockholders, Lampert and Fairholme Capital, along with their related entities, own approximately 80% of SHLD and have interests that have been and continue to be intertwined. Together, Fairholme Capital and Lampert (through ESL) control approximately 20% of the voting power of Seritage.

142. In addition, Alvarez is beholden to Lampert because of his past business dealings with Lampert and expectation of future business dealings. Alvarez is currently a Senior Chairman and stockholder of the law firm of

Greenberg Traurig and previously served as the firm's Executive Chairman for more than three years and as its CEO for thirteen years. Greenberg Traurig has represented Sears, and its successor SHLD, for many years, and the firm has received substantial annual payments from these entities. For example, Greenberg Traurig represented Sears: (i) in a False Claims Act case filed by the United States and several states, *USA, et al. v. Sears Holdings Corporation, et al.*, No. 3:09-cv-00588 (S.D. Ill.); and (ii) on appeal following an adverse verdict at trial in *Learmonth v. Sears, Roebuck & Co.*, No. 09-60651 (5th Cir). Lampert has also retained Greenberg Traurig in connection with Orchard Supply Hardware Stores, a hardware retailer that SHLD spun-off in 2011, providing Lampert with a controlling interest. Greenberg Traurig has also represented OneWest Bank since at least 2012, which was co-founded by Mnuchin, who was the Chairman of OneWest Bank prior to its acquisition by CIT Group Inc. in 2015.¹¹ In addition, Greenberg Traurig represented ESL and Lampert in *Yarberry v. Sears Holdings Corporation*, No. 3:09-cv-00588 (S.D. Ill.) and has represented Lorillard Tobacco Company, which was owned by Tisch's family.

¹¹ Greenberg Traurig has routinely represented OneWest Bank in numerous actions. See, e.g., *Shreve v. Ocwen Loan Servicing LLC*, C.A. 2:16-at-00773 (E.D. Ca.); *Grant v. OneWest Bank, FSB*, C.A. No. 0-15-cv-61639 (S.D. Fl.); *Larivaux v. Bank of America, N.A., et al.*, No. 1:12-cv-11172 (D. Mass.); and *OneWest Bank, FSB v. Nunez*, No. 4-D13-4816 (Fl. App. Ct. Mar. 2, 2016). In addition, OneWest Bank's previous Head of Litigation is now a Co-Chair at Greenberg Traurig.

143. As a stockholder and Senior Chairman of Greenberg Traurig, Alvarez has a significant personal financial stake in the business relationship between Greenberg Traurig and SHLD, Lampert, ESL, and Mnuchin, and OneWest Bank. Since Lampert controls SHLD, he controls whether those economically advantageous relationships continue, making Alvarez further beholden to Lampert.

144. **Defendant Mnuchin.** Mnuchin currently sits on ESL's board of directors and is an ESL investor. Because of his interest in ESL, Mnuchin abstained from voting on the \$400 million loan to SHLD from ESL. Accordingly, Mnuchin, like Lampert and ESL, stood on both sides of the Seritage Transaction.

145. Mnuchin co-founded and manages Dune Capital Management, L.P. ("Dune Capital") a hedge fund which initially specialized in real estate loans and properties. After IndyMac Bank failed during the subprime mortgage crisis in 2009, Mnuchin, through Dune Capital, assembled a group of private equity investors and hedge funds which purchased IndyMac Bank from the Federal Deposit Insurance Corporation and renamed it OneWest Bank. After the purchase, Mnuchin became OneWest Bank's principal owner and Chairman.

146. Mnuchin is also beholden to Lampert in his professional career. In 2003, when Lampert controlled a majority of Kmart's stock and was the Chairman of its board of directors, Mnuchin was elected to Kmart's board. Lampert also

hired Mnuchin to serve as ESL's Vice-Chairman. When Kmart and Sears merged, Mnuchin was elected to SHLD's Board, which Lampert chaired.

147. In addition to his long-standing professional relationship with Lampert and ESL, Mnuchin and Lampert have a long-standing personal relationship which dates back to the early 1980s. Mnuchin and Lampert were college roommates at Yale University. After graduating from Yale, Mnuchin worked at Goldman Sachs from 1986 through 2003, along with Lampert who also worked at Goldman Sachs from 1984 to 1988.

148. Because of his conflicted status as an ESL board member and director, his economically advantageous relationship, and his long history as a friend, colleague, and employee of Lampert, Mnuchin lacks independence from Lampert and would not be able to independently consider a demand to pursue litigation on behalf of SHLD's stockholders.

149. **Defendant Tisch.** Tisch is a major investor in ESL and has been an ESL limited partner since 1992. ESL counts the Tisch family among its largest investors. Because of his interest in ESL, Tisch abstained from voting on the \$400 million loan to SHLD from ESL. In addition to his personal financial stake in ESL, Tisch's long-time colleague Thomas M. Steinberg, who was President of Tisch Family Interests for twenty-two years, also serves with Lampert as a member of Seritage's board of trustees. Given his interest in ESL, Tisch, like Lampert and

ESL, stood on both sides of the Seritage Transaction and would be unable to independently consider a demand to pursue litigation against Lampert and others, including himself, for breaches of fiduciary duties related to the Seritage Transaction.

150. Aside from his personal interest in ESL, Tisch also lacks independence from Lampert due to his long-term business and personal relationship with Lampert, as well as other Board members. In 1993, Tisch sold a Greenwich, Connecticut, property to Lampert after joining him at ESL. Tisch's family owns the Loews Corporation, which at one time owned Lorillard Tobacco Company before spinning it off in 2007. Lorillard Tobacco has been represented by Greenberg Traurig, Alvarez's law firm. *See, e.g., Broin v. Philip Morris Cos. Inc.*, No. 92-1405 (Fl. Ct. App.).

151. In addition, like Mnuchin and Reese, Tisch was first a Kmart director and then was elected to SHLD's Board in March 2005. Tisch has also publicly expressed admiration for Lampert to the media and expressed his commitment to Lampert on numerous occasions.

152. **Defendant Reese.** Reese is beholden to and lacks independence from Lampert because of her long association with Lampert and demonstrated deference to Lampert regarding interested transactions involving Lampert or ESL. Like Mnuchin and Tisch, Reese served on Kmart's board of directors and was elected to

SHLD's Board following the 2005 Kmart-Sears merger. Internal SHLD documents

[REDACTED]

[REDACTED]

153. Mnuchin, Tisch, and Reese have all served on SHLD's Board (and the board of directors of its predecessor, Kmart) for over twelve years, a tenure well-beyond what respected corporate governance advisor Institutional Shareholder Services ("ISS") defines as excessive. ISS states in its May 2015 Governance Quick Score 3.0 that any tenure longer than nine years should be considered excessive, because "tenure of more than nine years is considered to potentially compromise a director's independence."

154. Excessive tenure is even more problematic for companies like SHLD where the long-tenured directors have served under the constant leadership of a well-known and controlling joint Chairman and CEO, like Lampert. According to ISS, "directors who have sat on the board in conjunction with the same management team may reasonably be expected to support that management team's decisions more willingly."

155. The problem is far worse at SHLD because, beyond simply the length of their tenure as Board members, Mnuchin, Tisch, and Reese each have a long-standing relationship with Lampert that predates their time on the Board. They were all placed on SHLD's very first Board following the Kmart-Sears merger.

156. **Defendant Kamlani.** Kamlani is also beholden and lacks independence from Lampert. Shortly after the Seritage Transaction, in March 2016, Lampert appointed Kamlani as President of ESL. Given his business relationship with and connection to ESL and Lampert, Kamlani would be unable to independently consider a demand to pursue litigation against Lampert and others, including himself, for breaches of fiduciary duties related to the transaction.

157. In view of the foregoing, Lampert, Alvarez, Mnuchin, Tisch, Reese, and Kamlani, six of the eight Board members, have disabling conflicts of interest and cannot be expected to independently consider a demand on the Board. Thus, any such demand by Plaintiffs would be a futile or useless act.

C. Lampert, Alvarez, Mnuchin, Reese, Tisch, and Kamlani Face a Substantial Likelihood of Personal Liability Arising Out of the Seritage Transaction

158. As detailed above, Lampert, Alvarez, Mnuchin, Reese, Tish, and Kamlani lack independence from ESL and entities controlled by Lampert, Fairholme Funds, or Fairholme Capital, and have disabling conflicts. As a result of their bad faith conduct, these defendants face a substantial likelihood of liability and, thus, are unlikely to prosecute Plaintiffs' claims. They are unlikely to imperil their own defense by engaging in a meaningful investigation into the propriety of SHLD's claims against them. If proven, their actions would violate fiduciary duties owed to SHLD, and give rise to significant civil liability. Demand is

therefore excused because these defendants would be required to subject themselves to personal liability.

159. Lampert, Alvarez, Mnuchin, Reese, Tisch, and Kamlani were aware of, participated in, and approved the wrongs alleged herein. They knowingly chose not to exercise the fiduciary duties of loyalty, good faith, independence, and candor owed to the Company and its stockholders. As SHLD's CEO, Lampert also knowingly chose not to exercise the fiduciary duties of loyalty and due care that he owed to the Company and its stockholders.

160. Thus, Lampert, Alvarez, Mnuchin, Reese, Tisch, and Kamlani are not disinterested because they are likely to be held liable in any action brought on behalf of SHLD for their gross negligence and/or wrongdoing relating to their approval of the Seritage Transaction.

D. Demand Is Excused Because the Director Defendants' Conduct Was Not a Valid Exercise of Business Judgment

161. Demand would also be futile, or is excused as a matter of law, because there is a reasonable doubt that the Seritage Transaction is the product of a valid exercise of business judgment.

162. The Director Defendants' conduct could not have been the product of legitimate business judgment as it was disloyal and involved an intentional, grossly negligent, or bad faith abdication of the Director Defendants' fiduciary duties, for which they face the risk of substantial personal liability.

163. Among other things, as to the Seritage Transaction, the Director Defendants: (i) abdicated oversight and control of the transaction processes to Lampert and other interested parties; (ii) agreed to the Seritage Transaction on terms that were unfair to SHLD; (iii) failed to retain an independent financial advisor; (iv) failed to obtain an independent fairness opinion and analysis from an advisor [REDACTED] (v) failed to follow any standard industry protocol for the sale of a large real estate portfolio; and (vi) failed to fully explore alternative transactions that could have raised capital or achieved other Company objectives on more favorable terms to SHLD.

164. As a result of the bad faith conduct described herein, none of the Director Defendants can claim exculpation from their breaches of fiduciary duties pursuant to the Company's Articles of Incorporation.

165. Furthermore, all eight of the Director Defendants currently serve on the SHLD Board, and therefore the Board remains dominated and controlled by the same wrongdoers who continue to obscure their own misconduct, and will not take action against themselves to protect the interests of SHLD.

E. The Director Defendants Also Face a Substantial Likelihood of Liability Because the Seritage Transaction Is Not Entirely Fair

166. As alleged herein, ESL is a controlling stockholder of SHLD and is itself controlled by Lampert.

167. The Seritage Transaction is subject to a heightened level of scrutiny under the entire fairness standard of review because ESL and Lampert stood on both sides of the transaction and because they received benefits not shared by other SHLD stockholders. Additionally, a majority of the Director Defendants was either interested in the Seritage Transaction or was not otherwise independent of Lampert.

168. As further alleged herein, the Seritage Transaction was not entirely fair to SHLD because SHLD received less value than it should have received on favorable terms, and the process through which the Seritage Transaction occurred was either flawed, or was improperly influenced by Lampert.

169. In approving the Seritage Transaction, the Director Defendants acted in bad faith or to advance the self-interest of Lampert and ESL, and failed to provide sufficient protective devices to ensure the fairness of this transaction to SHLD and its disinterested stockholders. Because the Seritage Transaction was not entirely fair to SHLD, the Director Defendants' actions cannot be deemed the product of a valid exercise of business judgment, the Director Defendants face a substantial likelihood of liability, and demand on SHLD's Board would be futile and is excused as a matter of law.

VIII. CLAIMS FOR RELIEF

A. COUNT I – Breach of Fiduciary Duty Against Lampert and ESL as Controlling Stockholders

170. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

171. Controlling stockholders Lampert and ESL owed SHLD and its other stockholders fiduciary duties of due care, good faith, and loyalty. By virtue of Lampert's positions as a director, officer, and controlling stockholder of SHLD, and through his exercise of control over SHLD's business and corporate affairs, Lampert and ESL have, and at all relevant times had, the power to control and influence and did control, influence, and cause SHLD to engage in the practices complained of herein. Lampert and ESL were required to: (i) use Lampert's ability to control and manage SHLD in a fair, just, and equitable manner; and (ii) act in furtherance of the best interests of SHLD and its stockholders and not their own interests.

172. Controlling stockholders Lampert and ESL breached their fiduciary duties of loyalty and care by taking the actions set forth throughout this Consolidated Amended Complaint, including by: (i) participating in, endorsing, or otherwise facilitating the Seritage Transaction; and (ii) failing to protect against the many conflicts of interests presented by Lampert, Alvarez, Mnuchin, Reese, Tisch,

and Kamlani, and by ESL and Fairholme Capital's own financial stakes in the Seritage Transaction.

173. By agreeing to the self-dealing Seritage Transaction, which divested SHLD of its core assets for unfair value, controlling stockholders Lampert and ESL breached their duties to deal with SHLD in good faith.

174. As a direct and proximate result of Lampert's and ESL's failure to fulfill their fiduciary obligations, SHLD has suffered and will continue to suffer damages. As described herein, Plaintiffs sustained harm because the Seritage Transaction, among other things: (i) undervalued SHLD's real estate assets; (ii) allotted undue control of SHLD's most valuable real estate assets to Lampert and ESL; (iii) deprived SHLD of its ability to enhance its liquidity in the future; and (iv) enriched Lampert, ESL, Fairholme Funds, and Fairholme Capital to the detriment of SHLD and its stockholders.

175. As a result of the misconduct alleged herein, Lampert and ESL are liable to SHLD.

176. Plaintiffs, on behalf of SHLD, have no adequate remedy at law.

B. COUNT II – Breach of Fiduciary Duty Against the Director Defendants

177. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

178. As described above, the Director Defendants owed SHLD and its stockholders fiduciary duties of care, loyalty, and good faith.

179. The Director Defendants violated fiduciary duties to SHLD by agreeing to the Seritage Transaction because it contains terms that are not entirely fair. The Seritage Transaction was not the product of a fair process because Lampert, Alvarez, Mnuchin, and Tisch stood on both sides of the transaction with conflicted interests, and the process lacked sufficient safeguards to ensure fair treatment for SHLD and its non-interested stockholders. The Seritage Transaction was also substantively unfair to SHLD's stockholders because it provided for the sale of 235 of SHLD's valuable real estate assets for insufficient consideration.

180. As a direct and proximate result of the Director Defendants' failure to fulfill their fiduciary obligations, SHLD has suffered and will continue to suffer damages. As described herein, Plaintiffs sustained harm because the Seritage Transaction, among other things: (i) undervalued SHLD's real estate assets; (ii) allotted undue control of SHLD's most valuable real estate assets to Lampert and ESL; (iii) deprived SHLD of its ability to enhance its liquidity in the future; and (iv) enriched Lampert, ESL, Fairholme Funds, and Fairholme Capital to the detriment of SHLD and its stockholders. The Director Defendants also have the duty to oversee SHLD's CEO, Lampert, and ensure that he is not breaching his fiduciary duties to the Company.

181. As a result of the misconduct alleged herein, the Director Defendants are liable to SHLD.

182. Plaintiffs, on behalf of SHLD, have no adequate remedy at law.

C. COUNT III – Aiding and Abetting Breach of Fiduciary Duty Against Fairholme Funds and Fairholme Capital

183. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

184. As described above, the Director Defendants and ESL owed SHLD and its stockholders fiduciary duties of care, loyalty, and good faith. Through their interests in entities including ESL and Fairholme Capital, Lampert, Alvarez, Mnuchin, and Tisch stood on both sides of the Seritage Transaction. As described herein, ESL and the Director Defendants breached fiduciary duties they owed to SHLD and its stockholders in completing the Seritage Transaction.

185. Fairholme Funds and Fairholme Capital aided and abetted the Director Defendants' and ESL's breaches of their fiduciary duties of care, loyalty, and good faith.

186. Fairholme Capital participated in and received special treatment via the structure of the Seritage Transaction. By virtue of Alvarez's position on the boards of both SHLD and Fairholme Funds, Fairholme Funds and Fairholme Capital knew that ESL and the Director Defendants breached fiduciary duties owed to SHLD and its stockholders and participated in the breaches notwithstanding that

knowledge. Furthermore, Fairholme Funds and Fairholme Capital exploited conflicts of interest, and otherwise conspired in or agreed to the Director Defendants' and ESL's breaches of their fiduciary duties, in order to benefit Fairholme Funds and Fairholme Capital at the expense of SHLD and its disinterested stockholders.

187. As a direct and proximate result of Fairholme Funds and Fairholme Capital's knowing participation in the Director Defendants and ESL's breaches of fiduciary duties, SHLD and its stockholders have suffered and will continue to suffer the damages summarized herein.

188. As a result of the misconduct alleged herein, Fairholme Funds and Fairholme Capital are liable to SHLD.

189. Plaintiffs, on behalf of SHLD, have no adequate remedy at law.

D. COUNT IV – Aiding and Abetting Breach of Fiduciary Duty Against Seritage

190. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

191. As described above, the Director Defendants and ESL owed SHLD and its stockholders fiduciary duties of care, loyalty, and good faith.

192. Seritage aided and abetted the Director Defendants' and ESL's breaches of their fiduciary duties of care, loyalty, and good faith.

193. Among other things, Seritage knew that the Director Defendants, including Lampert, permitted SHLD to retain [REDACTED] [REDACTED] with regard to the Seritage Transaction, despite the apparent conflicts that would arise in this [REDACTED] With Duff & Phelps serving [REDACTED] [REDACTED] there was no way that the Director Defendants (excluding Lampert) or the Related Party Transactions Subcommittee could negotiate or seek independent advice from Duff & Phelps as to the value of the properties and the overall value of the Seritage Transaction. Despite Lampert and ESL's control of SHLD, the Director Defendants were required to act in the best interests of the Company and its stockholders and could not succumb to Lampert and ESL's pressure to do the deal simply because they viewed it as the best option for SHLD.

194. By virtue of Lampert and ESL being on both sides of the Seritage Transaction (and by virtue of their control of SHLD), Seritage was privy to all information about the relative values of the properties which were subject of the Seritage Transaction. Seritage knew that Lampert and ESL controlled all information passed to Duff & Phelps, the SHLD Board, and the Related Party Transactions Subcommittee, and that the Director Defendants were acting at the behest of Lampert and ESL to approve the transaction. Seritage knew there was no independence between the parties to the Seritage Transaction.

195. Seritage knowingly aided and abetted the Director Defendants' wrongdoing alleged herein. In so doing, it rendered substantial assistance in order to effectuate the Director Defendants' plan to sell the properties for less than fair market value in breach of their fiduciary duties.

196. Seritage carried out and benefited from the Seritage Transaction with knowledge that ESL and the Director Defendants breached fiduciary duties owed to SHLD and its stockholders in the process as described herein. Seritage knowingly participated in Defendants' breaches by submitting to Lampert's direction to wrongfully: (i) carry out the Seritage Transaction at an unjustifiably low price and without any meaningful negotiation by SHLD's Board; (ii) include in the Seritage Transaction a Master Lease that included unique, and unfavorable terms, including discretionary recapture privileges; and (iii) structure the Seritage Transaction to uniquely and improperly favor Lampert, ESL, and Fairholme Capital.

197. In sum, Seritage was aware that SHLD—the counterparty to the Seritage Transaction—was not meaningfully represented in the Seritage Transaction, that Lampert was conflicted, and that ESL and the Director Defendants would breach fiduciary duties owed to the Company and unaffiliated stockholders by executing the transaction, but actively assisted their wrongful conduct nonetheless.

198. As a direct and proximate result of Seritage's knowing participation in the Director Defendants' and ESL's breaches of fiduciary duties, SHLD and its stockholders have suffered and will continue to suffer the damages summarized herein.

199. As a result of the misconduct alleged herein, Seritage is liable to SHLD.

200. Plaintiffs, on behalf of SHLD, have no adequate remedy at law.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against all Defendants as follows:

A. Declaring that the Director Defendants have breached their fiduciary duties to SHLD;

B. Declaring that Plaintiffs may maintain this action on behalf of SHLD and that Plaintiffs are adequate representatives of SHLD;

C. Determining that this action is a proper derivative action maintainable under Delaware law and demand is excused;

D. Determining and awarding to SHLD the damages sustained by it as a result of the violations set forth above from each of the Defendants, jointly and severally, together with interest thereon;

E. Directing the Director Defendants who control SHLD to take all necessary actions to reform and improve SHLD's corporate governance and internal procedures to comply with applicable laws and to protect SHLD and its stockholders from further self-interested transactions;

F. Awarding SHLD restitution from Defendants, and each of them;

G. Awarding to Plaintiffs the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

H. Granting such other and further relief as this Court deems just and equitable.

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