

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAVARITA D. MERIWETHER,
individually, and in her representative
capacity on behalf of the Sears Holdings
Savings Plan, the Sears Holdings Puerto Rico
Savings Plan, and all other similarly situated
Plan participants and beneficiaries,

Plaintiff,

v.

SEARS HOLDINGS CORPORATION,
EDWARD S. LAMPERT, SEARS
HOLDINGS CORPORATION
ADMINISTRATIVE COMMITTEE,
MICHAEL O'MALLEY, SEARS
HOLDINGS CORPORATION
INVESTMENT COMMITTEE, CAROL
HINES WACASER, and JOHN DOES 1 -10,

Defendants.

CASE NO. 1:17-cv-5825

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Table of Contents

I.	INTRODUCTION	1
II.	NATURE OF THE ACTION	1
III.	JURISDICTION AND VENUE	6
IV.	PARTIES	6
A.	Plaintiff	6
B.	Defendants And Their Fiduciary Status.....	6
1.	Company Defendant	6
2.	Officer and Director Defendant	8
3.	Administrative Committee Defendants.....	9
4.	Investment Committee Defendants.....	12
5.	Additional “John Doe” Defendants	20
V.	THE PLANS	20
A.	Sears Holdings Savings Plan	20
1.	History and Purpose of the Sears Plan.....	20
2.	Administration of the Sears Plan	22
3.	Management of the Sears Plan Assets	22
4.	Contributions.....	22
5.	Vesting	24
B.	Sears Holdings Puerto Rico Savings Plan	24
1.	History and Purpose of the Sears Puerto Rico Plan.....	24
2.	Administration of the Sears Puerto Rico Plan	26
3.	Management of the Sears Puerto Rico Plan Assets	26

4.	Contributions.....	26
5.	Vesting	28
VI.	THE SEARS HOLDINGS CORPORATION STOCK FUND	28
VII.	CLASS ACTION ALLEGATIONS IN THE ALTERNATIVE	33
VIII.	FACTS BEARING UPON DEFENDANTS’ FIDUCIARY BREACHES	35
A.	End Of Company Match And Other Events Preceding The Relevant Period	39
B.	The Company Continues To Unravel During The Relevant Period As Bankruptcy Looms	46
IX.	DEFENDANTS HAD A CONTINUING DUTY TO MONITOR THE SUITABILITY OF SEARS STOCK IN THE SAVINGS PLANS BUT FAILED TO DO SO AND IGNORED THE PUBLIC RED FLAGS REGARDING THE PERFORMANCE OF THE SEARS STOCK FUND	76
X.	PROTECTIVE ACTIONS DEFENDANTS COULD HAVE TAKEN REGARDING THE SAVINGS PLANS’ ASSETS INVESTED IN SEARS STOCK DURING THE RELEVANT PERIOD	80
XI.	THE RELEVANT LAW: CLAIMS FOR RELIEF UNDER ERISA.....	82
XII.	REMEDIES FOR BREACHES OF FIDUCIARY DUTY.....	84

I. INTRODUCTION

1. Plaintiff Lavarita D. Meriwether (“Plaintiff”), individually, and on behalf of the Sears Holdings Savings Plan (“Sears Plan”), the Sears Holdings Puerto Rico Savings Plan (“Sears Puerto Rico Plan”),¹ and all other similarly situated participants and beneficiaries of the Savings Plans (the “Participants”),² brings this action in a derivative capacity against the below-named defendants (collectively “Defendants”) pursuant to §§ 404, 405, 409, and 502 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1104, 1105, 1109, and 1132.

II. NATURE OF THE ACTION

2. This case is about the abject failure of the Defendants, fiduciaries of the Savings Plans, to protect the Participants’ interests in violation of the Defendants’ legal obligations under ERISA.³ Defendants breached the duties they owed to the Savings Plans and the Participants by, *inter alia*, failing to employ a prudent process with regard to monitoring the performance of the Sears Holdings Corporation Stock Fund (the “Sears Stock Fund”), and retaining that fund as an investment option under the Savings Plans, when a reasonable fiduciary using the “care, skill,

¹ The Sears Plan and the Sears Puerto Rico Plan are collectively referred to herein as the “Savings Plans” or “Plans.”

² Both Plans were established for the benefit of the employees of Sears Holdings Corporation (“Sears” or the “Company”) and the participating subsidiaries and affiliates of the Company.

³ All allegations contained herein are based upon personal information as to Plaintiff and the investigation of Plaintiff’s counsel, including, but not limited to a review of publicly filed documents, documents produced by the Company in response to Plaintiff’s request under ERISA Section 104(b)(4), or upon information and belief, where indicated. It is likely that, once discovery begins in earnest, the roles of additional persons or entities in the wrongdoing alleged below will be revealed and the wrongdoing itself will be further illuminated. In that event, Plaintiff will see to amend this Complaint to add new parties and/or claims in accordance with the Federal Rules of Civil Procedure and this Court’s rules.

prudence, and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use,” would have done otherwise. *See* ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).⁴

3. Specifically, and as discussed in greater detail below, Defendants permitted the Savings Plans to continue to offer the Sears Stock Fund as an investment option to Participants even after they knew or should have known that during the Relevant Period — between May 22, 2014 and the present — among other things: (1) Sears Stock Fund was a poorly performing investment option, continually failing, to *inter alia*, meet its stated performance benchmark; (2) there was no adequate process in place to monitor the continued prudence of including the Sears Stock Fund in the Savings Plans’ investment lineup; (3) the fiduciaries were not properly investigating the prudence of continuing to hold and invest the Savings Plans’ assets in the Sears Stock Fund in the face of well-reported dire circumstances facing the Company, including that:

- (a) Sears was dependent on an unsustainable business model that was no longer sought by the consumer;
- (b) Sears was unable to effectively compete with its peers;
- (c) Sears was consistently losing revenue;
- (d) Sears was unable to service its tremendous debt;
- (e) Sears was in dire financial condition; and
- (f) the Company faced equally poor long term prospects, including the likelihood of bankruptcy, making it an imprudent retirement investment for the Savings Plans;

⁴ Sears Plan Document (defined below) also provides that: (“Each fiduciary shall perform its duties under the Plan and the Trust Agreement...[w]ith the care, skill prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.”). *Id.*, Article 13.2.

and (4) a prudent fiduciary could not have reasonably believed that further and continued investment of the Savings Plans' contributions and assets in the Sears Stock Fund was in keeping with the expectations of the Savings Plans' settlors' expectations of how a prudent fiduciary would operate. Defendants were empowered, as fiduciaries, to remove the Sears Stock Fund from the Savings Plans' investment options, and/or close the Sears Stock Fund to new investments prior to January 1, 2017, yet they failed to do that, or to act to timely protect the interests of the Savings Plans and the Participants, in violation of their legal obligations under ERISA.

4. The thrust of Plaintiff's allegations under Counts I (breach of the duty of prudence) and II (breach of the duty of loyalty) is that Defendants allowed the investment of the Savings Plans' assets in the Sears Stock Fund throughout the Relevant Period, despite the fact that Defendants named in these Counts knew or should have known at least by the beginning of the Relevant Period that, based on the *totality of circumstances* prevailing at the time, that investment was imprudent for the Savings Plans, given the particular character and aims of the Savings Plans discussed below, as vehicles for accumulation of long-term retirement savings.

5. Indeed, the Supreme Court reaffirmed the ongoing fiduciary duty to monitor the suitability of a plan's investment options in *Tibble v. Edison, Int'l*, 135 S. Ct. 1823 (2015). *Tibble* held that "an ERISA fiduciary's duty is derived from the common law of trusts," and that "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." *Id.* at 1828. In so holding, the Supreme Court referenced with approval the Uniform Prudent Investor Act (the "UPIA"), treatises, and seminal decisions confirming the duty.⁵

⁵ *Tibble* cites with approval to the UPIA, which enshrines trust law and recognizes that "the duty of prudent investing applies both to investing and managing trust assets. . . ." 135 S. Ct. at 1828 (quoting Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act § 2(c) (1994)). The official comment explains that "[m]anaging' embraces monitoring, that is,

6. When enforcing the duties of prudence and loyalty, courts focus not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction. A “pure heart and an empty head” are not defenses to breaches of ERISA’s fiduciary duties. *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983). With respect to the Sears Stock Fund, as alleged below, Defendants failed to engage in a reasoned decision-making process, consistent with the duties of a prudent fiduciary, to review and properly evaluate, *inter alia*, the performance of the common stock of Sears (“Company Stock” or “Sears Stock”), the Company’s financial information as reported in its periodic filings, the reports of analysts and ratings agencies following the Company, and the financial news articles concerning Sears, to assess whether the Sears Stock Fund continued to be an appropriate investment for the Savings Plans. During the Relevant Period, Defendants breached their duties by investing, or allowing the investment of, the Savings Plans’ assets in the Sears Stock Fund, even though that investment option (a) failed to meet the Savings Plans’ stated objective of helping Participants accumulate retirement funds, (2) was performing poorly throughout the Relevant Period and unable to meet its performance benchmark, and (3) the Company’s downward path was obvious and unstoppable based on the information publicly available to the Savings Plans’ fiduciaries, charged with the stewardship of the Sears Stock Fund.

7. Given the totality of circumstances prevailing during the Relevant Period, no prudent fiduciary could have made the same decision as Defendants here to retain and/or continue purchasing the Sears Stock as a Plan investment. As alleged below, both before and during the Relevant Period, numerous publicly known red flags alerted Defendants that the Sears Stock Fund

the trustee’s continuing responsibility for oversight of the suitability of investments already made as well as the trustee’s decisions respecting new investments.” UPIA, comment § 2.

was an unsuitable investment for retirement. Yet, the Defendant-fiduciaries stood idly by and failed to properly monitor the continued prudence of the Sears Stock Fund as an investment option, while the value of the Savings Plans' investments in that fund continued to plummet. The Complaint documents the failure of Defendants over the course of many years, both before and during the Relevant Period, to protect the Savings Plans in response to the well-known deterioration of Sears' financial condition. Defendants' failure to act in the face of ongoing and massive losses to the Savings Plans, stemming from the Plans' investment in the Sears Stock Fund, is all the more egregious, given that one of the principal fiduciary wrongdoers, the Company's own Chief Executive Officer ("CEO"), who had first-hand knowledge of the depth of Sears' manifold financial troubles, was directly responsible for appointing and monitoring the very individuals in charge of overseeing the Savings Plans' investment options.

8. To remedy the breaches of fiduciary duties as described herein, Plaintiff seeks to recover the financial losses suffered by the Savings Plans as a result of the diminution in value of the Savings Plans' assets invested in the Sears Stock during the Relevant Period.

9. In an ERISA action such as this, the proper measure of damages is the difference between what the Participants received and what the Participants would have received if the Savings Plans' assets had been invested prudently. In other words, with respect to the calculation of the losses to a plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the participants in the plan would not have made or maintained investments in the challenged investment and, where alternative investments were available, that the investments made or maintained in the challenged investment would have instead been made in the most profitable alternative investment available. In this way, the remedy restores the value of the plan's assets to what they would have been if the plan had been properly administered.

III. JURISDICTION AND VENUE

10. ***Subject Matter Jurisdiction.*** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

11. ***Personal Jurisdiction.*** This Court has personal jurisdiction over all Defendants because they are all residents of the United States and ERISA provides for nation-wide service of process pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

12. ***Venue.*** Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) because the Plan is administered in this District, some or all of the fiduciary breaches for which relief is sought occurred in this District, and one or more Defendants reside or may be found in this District.

IV. PARTIES

A. Plaintiff

13. Plaintiff Lavarita D. Meriwether (defined above as “Plaintiff”) is a current Sears employee and “participant” in the Sears Holdings Savings Plan, within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7). During the Relevant Period, Plaintiff held shares of Sears Stock through her individual Plan account, and suffered losses as a result of investing her retirement Plan assets in Sears Stock. Specifically, during the Relevant Period, the value of the Sears shares in Plaintiff’s account diminished as a result of Defendants’ breaches of fiduciary duty described herein. Plaintiff is no different, in all material respects, than the thousands of other Sears employees who entrusted the Defendant-fiduciaries with their retirement savings.

B. Defendants And Their Fiduciary Status

1. Company Defendant

14. Defendant Sears is a Delaware corporation, headquartered at 3333 Beverly Road, Hoffman Estates, Illinois.

15. Defendant Sears is the named fiduciary of the Savings Plans. *See* Sears Holdings Savings Plan Annual Report filed on Form 11-K on June 28, 2016 (the “2016 Sears Plan Form 11-K”) at 8; Sears Holdings Puerto Rico Savings Plan Annual Report filed on Form 11-K on June 28, 2016 (the “2016 Sears Puerto Rico Plan Form 11-K”) at 8. Defendant Sears is also the sponsor of the Savings Plans. *See* 2016 Sears Plan Form 11-K at 7; 2016 Sears Puerto Rico Plan Form 11-K at 7.

16. The governing document of the Sears Plan provides that “[t]he Chief Executive Officer of the Company shall have the responsibility of appointing and removing (with or without cause) (i) the members of the Administrative Committee, to which is allocated under the Plan the overall responsibility for the administration and operation of the Plan, and (ii) the members of the Investment Committee to which is allocated under the Plan the overall responsibility for the investment of the Trust Fund.” Sears Holdings Savings Plan, Amended and Restated Effective January 1, 2014 (“Sears Plan Document”), Article 13.1(a)⁶.

17. At all relevant times, Sears acted with respect to the Savings Plans’ assets through its Chief Executive Officer (“CEO”), and other officers, directors and employees, including members of the Company’s Administrative and Investment Committees (defined below), who performed plan-related fiduciary functions in the course and scope of their employment and/or affiliation with Sears. Among other things, the Company, through its CEO and/or the Administrative and Investment Committees, whose members are employed by Sears, has had and/or has exercised the authority to appoint and/or remove the administrators, managers, and/or investment advisors, with respect to the Savings Plans’ assets. Upon information and belief, Sears

⁶ Plaintiff has requested, and the Company has produced on May 31, 2017, certain plan documents pursuant to Section 104(b)(4) of ERISA, 29 U.S.C. § 1024(b)(4). Certain of these documents produced by the Company are referenced herein.

is also responsible, through its CEO and/or the Administrative and Investment Committees, for reviewing the performance of any fiduciary of the Savings Plans or other person(s) or entity(ies) to whom the fiduciary duties have been delegated or allocated with respect to the assets of the Savings Plans. Accordingly, the actions of the individual defendants named herein, and other employee-fiduciaries are imputed to Sears under the doctrine of *respondeat superior*, and Sears is liable for these actions.

18. During the Relevant Period, in addition to being a named fiduciary of the Savings Plans, and in light of the foregoing duties, responsibilities and actions, Sears possessed the ultimate decision-making authority concerning whether to retain the Sears Stock Fund as an investment option, and whether to continue to invest the assets of the Savings Plans in that Fund. For example, in or around September 2016, the Participants were advised that “*the company* has determined to close the Stock Fund to future investments.” Plan Administrator Notice Re Savings Plan Changes, dated September 2016 (emphasis added).

19. Accordingly, throughout the Relevant Period, Sears was a fiduciary of the Savings Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21) because it (1) has exercised discretionary authority or discretionary control respecting the management of the Savings Plans, and/or (2) has exercised any authority or control respecting the management or disposition of the assets of the Savings Plans, and/or (3) has had discretionary authority or discretionary responsibility in the administration of the Savings Plans.

2. Officer and Director Defendant

20. Defendant Edward S. Lampert (“Lampert”) began to serve as the CEO of Sears, effective as of February 1, 2013. Additionally, Defendant Lampert serves as the Chairman of the Board of Directors of the Company.

21. Pursuant to the Sears Plan Document, during the Relevant Period, in his capacity as the CEO of Sears, Defendant Lampert has been charged with the responsibility of appointing and removing (with or without cause), members of the Administrative and Investment Committees (*id.*, Article 13.1(a)), and as such, was further responsible for monitoring the members of these Committees in the course of their fiduciary service respecting the Savings Plans, and in particular their stewardship of the Sears Stock Fund.

22. During the Relevant Period, Defendant Lampert has been a fiduciary of the Savings Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21) because he (1) has exercised discretionary authority or discretionary control respecting the management of the Savings Plans, and/or (2) has exercised any authority or control respecting the management or disposition of the assets of the Savings Plans, and/or (3) has had discretionary authority or discretionary responsibility in the administration of the Savings Plans, through his appointment of other fiduciaries of the Savings Plans, namely the members of the Administrative and Investment Committees.

3. Administrative Committee Defendants

23. Defendant the Sears Holdings Corporation Administrative Committee (“Administrative Committee”) is the named fiduciary of the Savings Plans. *See* 2016 Sears Plan Form 11-K at 8; 2016 Sears Puerto Rico Plan Form 11-K at 8.

24. According to the Sears Plan Document, “‘Administrative Committee’ shall mean the Sears Holdings Corporation Administrative Committee (or its successor), as constituted from time to time and established in accordance with Article 13, which shall have the authority to administer the Plan.” *Id.*, Article 2.4.

25. Defendant Administrative Committee consists of not less than three (3) members, appointed by the CEO of the Company. Sears Plan Document, Article 13.3(d). The

Administrative Committee members “shall remain in office at the will of the Chief Executive Officer, and the Chief Executive Officer may from time to time remove any of said members with or without cause and shall appoint their successors.” *Id.* Each member of the Administrative Committee “shall be an officer or Employee of an Employer hereunder, or at the discretion of the Chief Executive Officer, an independent contractor or advisor to the Company.” *Id.*, Article 13.3(e). The Administrative Committee is comprised of employees of Sears Holdings Management Corporation (“SHMC”).⁷ *See* 2016 Sears Plan Form 11-K at 7; 2016 Sears Puerto Rico Plan Form 11-K at 7.

26. Upon information and belief, Defendant Michael O’Malley (“O’Malley”) has served on the Administrative Committee during the Relevant Period. Defendant O’Malley signed the Savings Plans’ respective Form 5500 for the plan year 2015, filed with the Department of Treasury Internal Revenue Service and the Department of Labor, as the Plan Administrator. *See* Sears Plan Form 5500, dated August 25, 2016 (“2015 Sears Plan Form 5500”) at 1; Sears Puerto Rico Plan Form 5500, dated August 25, 2016 (“2015 Sears Puerto Rico Plan Form 5500”) at 1. Upon information and belief, Defendant O’Malley also serves as the Vice President of Benefits at the Company.

27. Defendant Administrative Committee is the Plan Administrator of the Savings Plans. *See* 2016 Sears Plan Form 11-K at 7; 2016 Sears Puerto Rico Plan Form 11-K at 7. According to the Savings Plans’ filings, “[t]he administration of the Plan’s operations is the sole responsibility of the Plan Administrator.” *Id.*

⁷ SHMC, a subsidiary of the Company, with shares owned by Sears, Roebuck and Co. and Kmart Management Corporation, handles marketing operations for the Sears Roebuck and Kmart retail stores, and operates the sears.com and kmart.com retail Internet websites.

28. Further, according to the Sears Plan Document, the Administrative Committee “may establish from time to time” certain rules and restrictions concerning the Participants’ investment fund elections. Sears Plan Document, Article 6.3.

29. Additionally, the Administrative Committee, in its capacity as the Plan Administrator, or its authorized representative, “may establish from time to time” certain rules and restrictions concerning transfers between the investment funds. Sears Plan Document, Article 6.5.

30. The Administrative Committee, in its capacity as the Plan Administrator, or its authorized representative, “may decline to implement investment instructions where it deems appropriate...”. Sears Plan Document, Article 6.3(d).

31. As discussed in further detail below, in or around September 2016, the Administrative Committee, in its capacity as the Plan Administrator, advised Participants that effective January 1, 2017, the Sears Stock Fund will be closed to new investments. Plan Administrator Notice Re Savings Plan Changes, dated September 2016.

32. In connection with notifying Participants of the closure of the Sears Stock Fund to new investments, the Administrative Committee, in its capacity as the Plan Administrator, advised Participants as follows:

You May Want To Take Action

Do you want to increase the amount held in the Stock Fund? You can increase the amount of future contributions that will be invested in the Stock Fund and/or transfer balances from other investment funds into the Stock Fund until market close on December 30, 2016.

Plan Administrator Notice Re Savings Plan Changes, dated September 2016 (emphasis in original).

33. The Administrative Committee, including Defendant O’Malley, and the other members thereof, whose identities are presently unknown to Plaintiff, are collectively referred to

herein as the “Administrative Committee Defendants.” Once the identities of the remainder of the Administrative Committee members who served on this Committee during the Relevant Period are ascertained through discovery proceedings, Plaintiff will include them in any amended pleading(s) under their proper names.

34. During the Relevant Period, the Administrative Committee Defendants have been fiduciaries of the Savings Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21) because they (1) have exercised discretionary authority or discretionary control respecting the management of the Savings Plans, and/or (2) have exercised any authority or control respecting the management or disposition of the assets of the Savings Plans, and/or (3) have had discretionary authority or discretionary responsibility in the administration of the Savings Plans.

4. Investment Committee Defendants

35. Defendant the Sears Holdings Corporation Investment Committee (“Investment Committee”) is the named fiduciary of the Savings Plans. *See* 2016 Sears Plan Form 11-K at 8; 2016 Sears Puerto Rico Plan Form 11-K at 8.

36. According to the Sears Plan Document, “‘Investment Committee’ shall mean the Sears Holdings Corporation Investment Committee, as constituted from time to time (and any successor thereof) and as established in accordance with Article 13, which shall have the authority to control and manage the investment operations of the Plan and Trust (subject to the provisions of Section 404(c) of ERISA).” *Id.*, Article 2.20.

37. Defendant Investment Committee consists of not less than three (3) members, appointed by the CEO of the Company. Sears Plan Document, Article 13.3(d). The Investment Committee members “shall remain in office at the will of the Chief Executive Officer, and the Chief Executive Officer may from time to time remove any of said members with or without cause and shall appoint their successors.” *Id.* Each member of the Investment Committee “shall be an

officer or Employee of an Employer hereunder, or at the discretion of the Chief Executive Officer, an independent contractor or advisor to the Company.” *Id.*, Article 13.3(e). As the Administrative Committee, the Investment Committee is also comprised of SHMC employees. *See* 2016 Sears Plan Form 11-K at 8; 2016 Sears Puerto Rico Plan Form 11-K at 8.

38. Upon information and belief, Defendant Carol Hines Wacaser (“Wacaser”) has served on the Investment Committee during the Relevant Period. Defendant Wacaser executed the Trust Agreement (defined below) as Secretary to the Investment Committee. Trust Agreement at 63. Upon information and belief, Defendant Wacaser also serves as Associate General Counsel to the Company. *Id.*

39. According to the Savings Plans’ filings, the Investment Committee “has authority relating to the acquisition, retention and disposition of Plan assets and the appointment, retention, and termination of investment managers.” *See* 2016 Sears Plan Form 11-K at 8; 2016 Sears Puerto Rico Plan Form 11-K at 8.

40. Furthermore, the Investment Committee “shall have the responsibility for the investment of the assets of the Plan held in the Trust Fund, which responsibility is specifically described in the Plan and the Trust Agreement.” Sears Plan Document, Article 13.1(b).

41. Additionally, the Investment Committee is charged with establishing and maintaining “the statement of investment policy” for the Savings Plans. Sears Plan Document, Article 13.16.

42. Along with the Plan Administrator, the Investment Committee, or its authorized representative, “may decline to implement investment instructions where it deems appropriate...”. Sears Plan Document, Article 6.3(d).

43. Prior to the October 2016 amendment, the Sears Plan Document provided as follows, with respect to the Investment Committee's authority and discretion concerning the investment funds to be offered to Participants for retirement savings:

Investment Funds. The Investment Committee shall determine the number and type of **Investment Funds** to be offered under the Plan, including the number of mutual funds, and the number that are not mutual funds, and the investment style of each option, including, without limitation, active or passive management style, growth or value investment orientation, composition of debt and equity securities and focus on domestic or international securities, in accordance with its powers, rights and duties as set forth in Section 13.6. The Investment Committee in its discretion may change the number of Investment Funds offered, and the Investment Committee may, in its discretion, change the investment strategy or categories of permitted investments of any Investment Fund for which it is responsible without prior notice to Participants. One of the Investment Funds shall be the "**Sears Holdings Stock Fund**," which shall be invested in Sears Holdings Shares and cash or cash equivalents held for liquidity purposes, and shall constitute the ESOP. The Investment Funds shall be listed in Appendix B. Notwithstanding the foregoing, the Investment Committee shall offer no less than three (3) Investment Funds, other than the Sears Holdings Stock Fund, each of which is diversified and has materially different risk and return characteristics.

Sears Plan Document, Article 6.1 (emphasis in the original).

44. On October 10, 2016, the Sears Plan Document was amended with regard to, *inter alia*, the above-discussed Article 6.1, to provide in relevant part:

2. Section 6.1, Investment Funds, is hereby amended by deleting it in its entirety and inserting a new Section 6.1 in its place to read as follows:

"6.1 Investment Funds. The Investment Committee shall determine the number and type of **Investment Funds** to be offered under the Plan, including the number of mutual funds, and the number that are not mutual funds, and the investment style of each option, including, without limitation, active or passive management style, growth or value investment orientation, composition of debt and equity securities and focus on domestic or international securities, in accordance with its powers, rights and duties as set forth in Section

13.6. The Investment Committee in its discretion may change the number of Investment Funds offered, and the Investment Committee, may, in its discretion, change the investment strategy or categories of permitted investments of any Investment Fund for which it is responsible without prior notice to Participants. One of the Investment Funds shall be the “**Sears Holdings Stock Fund**,” which shall be invested in Sears Holdings Shares and cash or cash equivalents held for liquidity purposes, and shall constitute the ESOP. The Investment Funds shall be listed in Appendix B. Notwithstanding the foregoing, with the exception of dividends on the Sears Holdings shares held in Participants’ Accounts and subaccounts, effective January 1, 2017, no new contributions or other amounts may be invested in, or transferred into, the Sears Holdings Stock Fund. Dividends on Sears Holdings shares held in Participants’ Accounts and subaccounts may continue to be reinvested in Sears Holdings shares as provided in Section 6.9 for so long as the Sears Holdings Stock Fund is a permitted Investment Fund pursuant to Section 6.9 and Appendix B. The Investment Committee shall offer no less than three (3) Investment Funds, other than the Sears Holdings Stock Fund, each of which is diversified and has materially different risk and return characteristics.”

Eighth Amendment To The Sears Holdings Plan, dated October 10, 2016 (“Eighth Amendment To Sears Plan Document”) (emphasis in the original).

45. A certain portion of each of the investment funds in the Savings Plans, including the Sears Stock Fund, may be held in cash or cash equivalents, as determined by the Investment Committee. Sears Plan Document, Article 6.6. Specifically, “[t]he percentage of assets held in each Investment Fund in cash or cash equivalents may differ from Fund to Fund and from time to time, as considered appropriate by the Investment Committee, or its authorized representative, in accordance with Section 13.9, in the case of all Investment Funds excluding mutual funds and commingled funds. *Id.*

46. Furthermore, according to the Sears Plan Document:

Changes to Investment Funds. The Investment Committee, in its discretion, may direct the Trustee to establish such Investment Funds or to terminate any of the Investment Funds as it shall from time to time consider appropriate and in the best interests of the

Participants, at which time a new Appendix B shall be created to replace the prior Appendix B.

Sears Plan Document, Appendix B-3 (emphasis in the original).

47. Additionally, according to the Sears Holdings Savings Plan Master Trust Agreement, restated effective as of January 30, 2014 (“Trust Agreement”):

Company Stock Funds. Subject to the provisions of Article 5, if, and to the extent specifically authorized by the [Savings] Plans, the Investment Committee may direct the Trustee to establish one or more Investment Funds substantially all of the assets of which shall be invested in securities which constitute “qualifying employer securities” or “qualifying employer real property” within the meaning of Section 407 of ERISA. It shall be the duty of the Investment Committee or the Investment Manager to determine that such investment is not prohibited by Sections 406 or 407 of ERISA. In addition, during any tie when there is no Investment Manager with respect to a Company Stock Fund (such as before an investment management agreement takes effect or after it terminates), the Investment Committee shall direct the Trustee with respect to the acquisition, retention and disposition of the assets from time to time comprising such Company Stock Fund as well as with respect to the ESOP, and the Trustee shall have no duty or obligation to make recommendations with respect to the investment, reinvestment or retention thereof, nor with respect to the voting of proxies thereon, except as would otherwise be required to meet the Trustee’s obligations under the Trust Agreement, ERISA or any other applicable state or federal law to the extent not preempted by ERISA.

Id., Article 4.3.

48. Pursuant to the Sears Plan Document, with regard to the authority and duties of the Investment Committee:

General Powers, Rights and Duties of the Investment Committee. In addition to the powers, rights and duties conferred or imposed upon the Investment Committee elsewhere in the Plan or by law, and/or in any Trust Agreement, the Investment Committee shall have the following powers, rights and duties:

(a) to review and approve investment policy guidelines recommended by the “Advisor” (described at Section 13.12);

(b) to determine the number and types of investment choices available to Participants, consistent with the Company's philosophy;

(c) subsequent to the determination of the number and types of investment options to be offered, based on the advice of the Advisor, (i) to select the mutual funds offered; and (ii) to appoint the Investment Managers as defined in Section 3(38) of ERISA ("Investment Managers") for the options offered that are not mutual funds, all in accordance with, and subject to the terms, conditions and limitations of Article 6;

(d) to execute and direct the trustee to execute, any agreements, representations and other documents with brokers, dealers, futures commission merchants and other counterparties necessary or appropriate to facilitate investment transactions for the Plan;

(e) to direct the Trustee to the extent required under the terms of any trust agreement, or to appoint an Investment Manager with the authority to so direct the Trustee, with respect to the acquisition, retention and disposition of Plan assets in the Sears Holdings Stock Fund and with respect to the exercise of investment powers, authorities and discretions relating to such assets;

(f) to furnish the Trustee, and the Company with such information as may be required by them for any purpose related to the Plan;

(g) to adopt such rules of procedure and regulations as in the Investment Committee's opinion may be necessary for the proper and efficient performance of the Committee's duties and responsibilities;

(h) to review and monitor the performance of the Advisor, and to provide recommendations to Sears Holdings Corporation as they deem necessary regarding the termination and replacement of the Advisor;

(i) to appoint a Secretary, who may, but need not, be a member of the Investment Committee, and to employ such other agents, attorneys, accountants, investment advisors and other persons and to delegate to them and allocate among them, in writing, such powers, rights and duties as the Investment Committee may consider necessary or advisable to properly carry out the Investment Committee's responsibilities, and in the same manner to revoke such delegation and allocation; the acceptance of such written allocation

or delegation shall also be in writing; any action of the delegate or person to whom responsibilities have been allocated shall have the same force and effect for all purposes hereunder as if such action had been taken by the Investment Committee; neither the Investment Committee nor any of its members shall be liable for the acts or omissions of such delegates or persons to whom responsibilities have been allocated except as required by law; and

(j) to appoint, terminate and replace Trustees and custodians of the Plan;

(k) to appoint an investment advisor (“Advisor”) and to review and monitor the performance of the Advisor; and

(l) to discharge all other duties set forth herein.

Sears Plan Document, Article 13.6.

49. Further, pursuant to the Sears Plan Document, as regarding the advisor to the Investment Committee:

General Powers, Rights and Duties of the Advisor. The Investment Committee shall appoint an investment advisor (the “Advisor”). The Advisor shall have the responsibility for:

(a) the development and recommendation to the Investment Committee of investment policy guidelines;

(b) the development and recommendation to the Investment Committee (or approval through the recommendation of a fund) of the investment guidelines and asset classes for each investment option;

(c) the monitoring of the performance of the Investment Managers and notifying the Investment Committee of any material events affecting the performance of those managers, and recommendations to the Investment Committee as to the selection, termination and replacement of such Investment Managers, and the monitoring of the performance of the mutual funds or commingled funds selected by the Investment Committee, and the recommendations to the Investment Committee as to the replacement of such funds;

(d) performing Investment Manager searches for the Investment Committee;

(e) the negotiation of the business and commercial terms and conditions of the of an Investment Manager for any Investment option (other than a mutual fund) offered under the Plan;

(f) ensuring (i) the proper coordination and communication among Investment Managers, including, but not limited to, matters relating to the allocation of responsibility among Investment Managers, and (ii) the proper coordination between Investment Managers and the trustees of the Trusts, including with respect to investment directions, proxy voting, securities lending;

(g) assisting with the organization of meetings with the Investment Committee to discuss the performance of the appointed Investment Managers; and

(h) such additional services as the Investment Committee shall designate.

Sears Plan Document, Article 13.12.

50. On information and belief, Towers Watson Investment Services, Inc. (“Towers Watson”) has been appointed to serve as investment advisor to the Investment Committee. *See* 2016 Sears Plan Form 11-K at 8; 2016 Sears Puerto Rico Plan Form 11-K at 8. On information and belief, Sears has hired Aon Hewitt Financial Advisors, LLC (“AFA”) to provide investment advisory services to Participants. Plan Administrator Notice Re Savings Plan Changes, dated September 2016. On information and belief, AFA in turn has hired Financial Engines Advisors L.L.C. (“FEA”) to provide sub-advisory services. *Id.*⁸

51. The Investment Committee, including Defendant Wacaser, and the other members thereof, whose identities are presently unknown to Plaintiff, are collectively referred to herein as the “Investment Committee Defendants.” Once the identities of the remainder of the Investment

⁸ Plaintiff reserves the right to amend to bring additional claims against (1) Towers Watson, (2) AFA, and/or (3) FEA, should further investigation or discovery reveal that Towers Watson, AFA, or FEA were fiduciaries with respect to the Savings Plans’ assets invested in the Sears Stock Fund during the Relevant Period.

Committee members who served on this Committee during the Relevant Period are ascertained through discovery proceedings, Plaintiff will include them in any amended pleading(s) under their proper names.

52. During the Relevant Period, the Investment Committee Defendants have been fiduciaries of the Savings Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21) because they (1) have exercised discretionary authority or discretionary control respecting the management of the Savings Plans, and/or (2) have exercised any authority or control respecting the management or disposition of the assets of the Savings Plans, and/or (3) have had discretionary authority or discretionary responsibility in the administration of the Savings Plans.

5. Additional “John Doe” Defendants

53. To the extent that there are additional officers and employees of Sears who were fiduciaries of the Savings Plans during the Relevant Period, including members of the Administrative and the Investment Committees, the identities of whom are currently unknown to Plaintiff, Plaintiff reserves the right, once their identities are ascertained, to seek leave to join them to the instant action. Thus, without limitation, unknown “John Doe” Defendants 1-10 include other individuals, including, but not limited to, Sears officers and employees, who were fiduciaries of the Savings Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21) during the Relevant Period.

V. THE PLANS

A. Sears Holdings Savings Plan

1. History and Purpose of the Sears Plan

54. Sears Holdings Savings Plan (defined above as the “Sears Plan”) is a defined contribution retirement savings plan, covering all eligible employees of Sears and its participating subsidiaries and affiliates. *See* 2016 Sears Plan Form 11-K at 8.

55. The history of the Sears Plan dates back to the beginning of the Twentieth Century, namely July 1, 1916, when Sears, Roebuck and Co. (“Sears Roebuck”) established a predecessor plan to the Sears Plan by the execution and adoption of a plan document (the “Plan Document”). *See* 2016 Sears Plan Form 11-K at 7. The Plan Document was fully amended and restated as of January 1, 2014, but has been amended from time to time thereafter. *See id.*

56. Following the merger of Sears Roebuck with Kmart Holding Corporation (“Kmart”) in March of 2005, the Kmart Retirement Savings Plan was merged with and into the Sears Plan. *See* 2016 Sears Plan Form 11-K at 7. Effective as of April 1, 2012, the Company (in the place of Sears Roebuck) was named as the sponsor of the Sears Plan. *See id.*

57. The Sears Holdings 401(k) Savings Plan Master Trust was established for the safekeeping of the Sears Plan’s assets and to commingle the investment of the Sears Plan’s assets with those of the Sears PR Plan. *See id.* Effective January 30, 2014, the Sears Holdings 401(k) Savings Plan Master Trust was renamed as the Sears Holdings Savings Plan Master Trust (“Master Trust”) and the Company (in the place of Sears Roebuck) was named as its sponsor. *See id.* As discussed below, the other participating plan in the Master Trust is the Sears Puerto Rico Plan. *See id.*

58. Upon information and belief, the purpose of the Sears Plan is to provide Participants with the opportunity to save for retirement. Sears Plan Document, Article 1.1 (“The Plan was established for the purpose of encouraging and assisting eligible employees of the Participating Employers in accumulating personal savings.”). Plan Administrator Notice Re Savings Plan Changes, dated September 2016 (The Sears Plan “is designed to help associates build savings for the future.”).

2. Administration of the Sears Plan

59. As noted above, the Administrative Committee has served as the Plan Administrator of the Sears Plan during the Relevant Period. *See* 2016 Sears Plan Form 11-K at 7.

60. According to the 2016 Sears Plan Form 11-K, State Street Bank and Trust Company (“State Street”) serves as the trustee for the Master Trust and holds the investments of the Sears Plan under a trust agreement, which was fully amended and restated as of January 30, 2014. *See id.* at 8. The Sears Plan’s filings further provide that Hewitt Associates, LLC (“Aon Hewitt”), a subsidiary of Aon Corporation, serves as the recordkeeper of the Sears Plan. *See id.*

3. Management of the Sears Plan Assets

61. As noted above, pursuant to the filings of the Sears Plan, the Investment Committee is charged with authority pertaining to, *inter alia*, “the acquisition, retention and disposition of Plan assets and the appointment, retention, and termination of investment managers.” *See* 2016 Sears Plan Form 11-K at 8. As also noted above, Towers Watson has been appointed as investment advisor. *See id.*

4. Contributions

62. During the Relevant Period, Participants could contribute to the Sears Plan up to 50% of their annual salary on a pre-tax basis, and up to 25% of their annual salary as after-tax contributions. *See* 2016 Sears Plan Form 11-K at 8. Participants turning age 50 or older during a Plan year could make an additional pre-tax “catch-up” contribution, up to the applicable Internal Revenue Service catch-up contribution limit. *Id.* Furthermore, certain “Highly Compensated” employees’ pre-tax contributions are limited to 2% of their eligible salary, and these employees are not permitted to make after-tax contributions. *Id.*

63. According to the Sears Plan documents, prior to January 1, 2017, Participants could invest both their pre-tax and after-tax contributions in any combination of the following Plan

investment funds: “the Sears [Stock Fund], which invests principally in Sears Holdings Corporation stock; the Stable Value Fund; the Bond Fund; the U.S. Bond Index Fund; the S&P 500 Index Fund; the Small-Mid Cap Value Fund; the Small-Mid Cap Growth Fund; the Small-Mid Cap Index Fund; the Large Cap Value Fund; the Large Cap Growth Fund; the International Equity Fund; the Global Equity Index Fund; any of four Target Retirement Funds (five funds prior to March 2015); and the Self-Managed Brokerage Account (through which a participant may invest in any number of mutual funds, common stock and other investments).” 2016 Sears Plan Form 11-K at 8.

64. As discussed below, effective January 1, 2017, the Sears Stock Fund was closed to new investments. The Participants were advised, *inter alia*, that if the investment options in their Plan accounts included the Sears Stock Fund, they had to change that, effective January 1, 2017. If no change was made, then starting January 1, 2017, all amounts in the Participants’ accounts that would have been allocated to the Sears Stock Fund, including Participants’ contributions, would be automatically invested in a Target Retirement Fund. Sears Plan Summary of Material Modifications, effective January 1, 2017 (“2017 SMM”).

65. With respect to the Company’s matching contributions, “[t]hrough payroll periods ended January 31, 2009, the Company matching contribution was fixed at 100 percent of a participant’s pre-tax contributions up to the first three percent of eligible compensation and 50 percent of the pre-tax contributions the participant made on the next two percent of eligible compensation.” 2016 Sears Plan Form 11-K at 9.

66. Notably, “[t]he Plan was amended to suspend the employer matching contributions for payroll periods that ended after January 31, 2009, until further amendment of the Plan.” 2016 Sears Plan Form 11-K at 9.

67. Before the matching contributions were suspended, “the Plan allowed for the Company matching contribution to be made quarterly and to be payable in cash or stock or a combination of both.” 2016 Sears Plan Form 11-K at 9. If the Company match was made in cash, it was invested based on Participants’ pre-tax contribution elections. *See id.* If the Company made its contribution in stock, “it was invested in the Holdings Stock Fund.” *Id.*

68. The Sears Plan also “includes a provision that allows for discretionary matching contributions,” subject to a three-year cliff vesting schedule. 2016 Sears Plan Form 11-K at 9. No such discretionary matching contributions were made in 2015 or 2014.” *See id.*

5. Vesting

69. According to the 2016 Sears Plan Form 11-K, Participants are immediately fully vested in both their contributions and the Company’s matching contributions (other than the discretionary matching contributions). *See id.* at 8-9. The 2016 Sears Plan Form 11-K further explains that “[p]rior to April 1, 2012, the vested status of a participant who terminated employment prior to January 1, 2006, was determined based upon the terms of the Plan in effect at his or her date of termination.” *Id.* at 9. Subsequently, “[a]s of April 1, 2012, the plan administrator determined that all account balances of active and inactive participants were fully vested, including matching contributions.” *Id.*

B. Sears Holdings Puerto Rico Savings Plan

1. History and Purpose of the Sears Puerto Rico Plan

70. As the Sears Plan discussed *supra*, the companion Sears Holdings Puerto Rico Savings Plan (defined above as the “Sears Puerto Rico Plan”) is a defined contribution retirement savings plan. *See* Sears Holdings Puerto Rico Savings Plan Annual Report filed on Form 11-K on June 28, 2016 (the “2016 Sears Puerto Rico Plan Form 11-K”) at 7.

71. In 2005, Sears Roebuck established a predecessor plan to the Sears Puerto Rico Plan by the execution and adoption of a plan document (the “Puerto Rico Plan Document”). *See* 2016 Sears Puerto Rico Plan Form 11-K at 7. The predecessor plan “was established as a substitute plan for participants of the Sears 401(k) Savings Plan (now known as the [Sears Plan]), who were (are) employees of Sears, Roebuck de Puerto Rico, Inc. and who reside in the Commonwealth of Puerto Rico.” *Id.* The Sears Puerto Rico Plan Document was fully amended and restated as of December 31, 2011, but has been amended from time to time thereafter. *See id.*

72. On March 31, 2012, following the merger of Sears Roebuck with Kmart some years earlier, the Kmart Retirement Plan for Puerto Rico Employees was merged with and into the predecessor of the Sears Puerto Rico Plan, thereby creating the instant Sears Puerto Rico Plan. *See* 2016 Sears Puerto Rico Plan Form 11-K at 7. At that time, the Company (in the place of Sears Roebuck) was named as the sponsor of the Sears Puerto Rico Plan. *See id.* According to the filings of the Sears Puerto Rico Plan, “[e]mployers [] under the Plan are certain wholly-owned subsidiaries of the Company and include [Sears Roebuck], Roebuck de Puerto Rico, Inc., Kmart Holding Corporation, and Kmart Corporation.” *Id.*

73. The investments of the Sears Puerto Rico Plan “are held for safekeeping and commingled for investment purposes with the participating plans under [the Master Trust]...” *See* 2016 Sears Puerto Rico Plan Form 11-K at 7; *see also id.* at 13 (“Use of the Master Trust permits the commingling of the Plan’s assets with the assets of the [Sears Plan], and its predecessor plans, for investment and administrative purposes”). As noted above, the other participating plan in the Master Trust is the Sears Plan.

74. Upon information and belief, the purpose of the Sears Puerto Rico Plan, as that of the Sears Plan, is to provide Participants with the opportunity to save for retirement.

2. Administration of the Sears Puerto Rico Plan

75. As noted above, the Administrative Committee has served as the Plan Administrator of the Sears Puerto Rico Plan during the Relevant Period. *See* 2016 Sears Puerto Rico Plan Form 11-K at 7.

76. As alleged above, State Street serves as the trustee for the Master Trust and holds the investments of the Sears Puerto Rico Plan under a trust agreement, which was fully amended and restated as of January 30, 2014. *See* 2016 Sears Puerto Rico Plan Form 11-K at 8. State Street also serves as the custodian of the Sears Puerto Rico Plan's trust. *See id.* Banco Popular de Puerto Rico serves as the trustee of the Sears Puerto Rico Plan's trust. *See id.* at 7-8. As with the Sears Plan, Aon Hewitt serves as the recordkeeper of the Sears Puerto Rico Plan. *See id.*

3. Management of the Sears Puerto Rico Plan Assets

77. As with the Sears Plan, pursuant to the filings of the Sears Puerto Rico Plan, the Investment Committee "has authority relating to the acquisition, retention and disposition of Plan assets and the appointment, retention, and termination of investment managers." *See* 2016 Sears Puerto Rico Plan Form 11-K at 8. Likewise, the Sears Puerto Rico Plan's filings provide that Towers Watson has been appointed as investment advisor. *See id.*

4. Contributions

78. During the Relevant Period, Participants could contribute to the Sears Puerto Rico Plan up to 25% of their annual salary on a pre-tax basis, and up to 10% of their annual salary as after-tax contributions, provided that in the aggregate a Participant's contributions per payroll period cannot exceed 25% of the Participant's eligible annual salary. *See* 2016 Sears Puerto Rico Plan Form 11-K at 8. Participants turning age 50 or older during a Plan year could make an additional pre-tax "catch-up" contribution, up to the applicable Puerto Rico Internal Revenue Code catch-up contribution limit. *Id.*

79. As with the Sears Plan, according to the Sears Puerto Rico Plan's filings, prior to January 1, 2017, Participants could invest both their pre-tax and after-tax contributions in any combination of the following Plan investment funds: "the Sears [Stock Fund], which invests principally in Sears Holdings Corporation stock; the Stable Value Fund; the Bond Fund; the U.S. Bond Index Fund; the S&P 500 Index Fund; the Small-Mid Cap Value Fund; the Small-Mid Cap Growth Fund; the Small-Mid Cap Index Fund; the Large Cap Value Fund; the Large Cap Growth Fund; the International Equity Fund; the Global Equity Index Fund; any of four Target Retirement Funds (five funds prior to March 2015); and the Self-Managed Brokerage Account (through which a participant may invest in any number of mutual funds, common stock and other investments)." *See* 2016 Sears Puerto Rico Plan Form 11-K at 8. As discussed below, effective January 1, 2017, the Sears Stock Fund was closed to new investments.

80. With respect to the Company's matching contributions, "[t]hrough payroll periods ended January 31, 2009, the Company contribution was fixed at 100 percent of a participant's pre-tax and/or after-tax contributions up to the first three percent of the participant's eligible compensation and 50 percent of the pre-tax and/or after-tax contributions the participant makes on the next two percent of eligible compensation." 2016 Sears Puerto Rico Plan Form 11-K at 8.

81. Notably, "[t]he Plan was amended to suspend the employer matching contribution on any pre-tax or after-tax contributions for payroll periods that ended after January 31, 2009, until further amendment of the Plan." 2016 Sears Puerto Rico Plan Form 11-K at 8-9.

82. Before the matching contributions were suspended, "the Plan allowed for the Company matching contribution to be made quarterly and to be payable in cash or stock, or a combination of both." 2016 Sears Puerto Rico Plan Form 11-K at 9. If the Company match was

made in cash, it was invested based on Participants' pre-tax contribution elections, or after-tax elections if there is no pre-tax election. *See id.* If the Company made its contribution in stock, "it was invested in the Holdings Stock Fund." *Id.*

83. The Sears Puerto Rico Plan also "includes a provision that allows for discretionary matching contributions," subject to a three-year cliff vesting schedule. 2015 Sears Plan Form 11-K at 9. No such discretionary matching contributions were made in 2015 or 2014." *See id.*

5. Vesting

84. According to the 2016 Sears Puerto Rico Plan Form 11-K, Participants are immediately fully vested in both their contributions and the Company's matching contributions (other than the discretionary matching contributions). *See id.* at 8-9. The 2016 Sears Puerto Rico Plan Form 11-K further explains that "[p]rior to April 1, 2012, the vested status of a participant who terminated employment prior to January 1, 2006 was determined based upon the vesting provisions of the Plan in effect at his or her date of termination." *Id.* at 9. Subsequently, "[a]s of April 1, 2012, the plan administrator determined that all account balances of active and inactive participants were fully vested, including matching contributions." *Id.*

VI. THE SEARS HOLDINGS CORPORATION STOCK FUND

85. During the Relevant Period, the Savings Plans offered a number of investment options, including the Sears Holdings Corporation Stock Fund (defined above as the "Sears Stock Fund"), which invests principally in Sears Stock. *See, e.g.,* 2016 Sears Plan Form 11-K at 8; 2016 Sears Puerto Rico Plan Form 11-K at 8.

86. As noted above, prior to January 1, 2017, Participants could invest both their pre-tax and after-tax contributions in the Sears Stock Fund. *See* 2016 Sears Plan Form 11-K at 8; 2016 Sears Puerto Rico Plan Form 11-K at 8. As also alleged above, before the Company's matching contributions for payroll periods ending after January 31, 2009 were suspended, the Company's

matches made in stock were automatically invested in the Sears Stock Fund. *See* 2016 Sears Plan Form 11-K at 9; 2016 Sears Puerto Rico Plan Form 11-K at 9.

87. Prior to the October 2016 amendment, with regard to, *inter alia*, the Sears Stock Fund, the Sears Plan Document provided as follows:

Sears Holdings Stock Fund. As described in Sections 1.1 and 6.1, the portion of the Plan invested in the Sears Holdings Stock Fund, as adjusted thereafter to reflect (a) new contributions that are invested in the Sears Holdings Stock Fund, as well as (b) subsequent fund transfers into or out of that fund, and (c) any distributions or withdrawals from and gains, losses, earnings, or expenses of that fund, shall satisfy the requirements of Section 4975(e)(7) of the Code and shall constitute the ESOP. The Sears Holdings Stock Fund is designed to invest exclusively in Sears Holdings shares, subject to the liquidity provisions of Section 6.6 above. Cash dividends paid during a Plan Year on Sears Holdings shares in the Sears Holdings Stock Fund allocable to a Participant's Account shall be reinvested in the Sears Holdings Stock Fund.

Sears Plan Document, Article 6.9.

88. On or around September 2016, the Plan Administrator advised Participants that effective January 1, 2017, the Sears Stock Fund would be closed to new investments. Plan Administrator Notice Re Savings Plan Changes, dated September 2016.

89. In particular, Participants were advised with respect to the changes to the Sears Stock Fund that, *inter alia*:

Sears Holdings Corporation Savings Plan Change Is Coming

Find Out What This Will Mean For You

The Sears Holdings Corporation Savings Plan ("Savings Plan") is designed to help associates build savings for the future. You are receiving this notice because we will soon be making a change to the Sears Holdings Corporation Stock Fund ("Stock Fund") in the Savings Plan. This notice explains what the change will mean to you.

What Is Changing?

Effective January 1, 2017, the Sears Holdings Corporation Stock Fund that is part of the Savings Plan (the “Stock Fund”) will be closed to new investments. Starting January 1, 2017:

- You will not be able to allocate contributions or transfer amounts in other investment options to the Stock Fund.
- Any existing Stock Fund balance will remain in place unless you voluntarily transfer assets out of the Stock Fund. If you transfer any amount in the Stock Fund to a different investment option, you will not be able to move that amount back into the Stock Fund. However, you will be able to leave balances in the Stock Fund as long as you are a participant.
- If your investment election includes the Stock Fund, you will need to change that, effective January 1, 2017. Otherwise, starting January 1, 2017, all amounts that would have been allocated to the Stock Fund, including contributions, automatic rebalancing, and loan payments, will be automatically invested in the Target Retirement Fund appropriate for your current age. The change will apply to all plan participants. ...

Plan Administrator Notice Re Savings Plan Changes, dated September 2016.

90. On October 10, 2016, the Sears Plan Document was amended with regard to, *inter alia*, Article 6.9 concerning the Sears Stock Fund, to provide in relevant part:

8. Section 6.9, Sears Holdings Stock Fund, is hereby amended by deleting it in its entirety and inserting a new Section 6.9 in its place to read as follows:

“6.9 Sears Holdings Stock Fund. As described in Sections 1.1 and 6.1, the portion of the Plan invested in the Sears Holdings Stock Fund, as adjusted thereafter to reflect (a) contributions that are invested in the Sears Holdings Stock Fund, as well as (b) subsequent fund transfers out of that fund, and (c) any distributions or withdrawals from and gains, losses, earnings, or expenses of that fund, shall satisfy the requirements of Section 4975(e)(7) of the Code and shall constitute the ESOP. The Sears Holdings Stock Fund is designed to invest exclusively in Sears Holdings shares, subject to the liquidity provisions of Section 6.6 above. Cash dividends paid during a Plan Year on Sears Holdings shares in the Sears Holdings Stock Fund allocable to a Participant’s Account shall be reinvested in the Sears Holdings Stock Fund.

Notwithstanding the foregoing, effective January 1, 2017, no additional contributions or other amounts shall be invested in, or transferred to, the Sears Holdings Stock Fund, with the exception of dividends on Sears Holdings shares held in Participants' Accounts and subaccounts, which can continue to be reinvested in Sears Holdings shares pursuant to this Section 6.9 for so long as the Sears Holdings Stock Fund is a permitted Investment Fund under the Plan."

Eighth Amendment To Sears Plan Document (emphasis in the original).

91. Subsequently, on or around November 2016, the Plan Administrator issued another update with regard to the closure of the Sears Stock Fund, effective January 1, 2017. Plan Administrator Notice Re Savings Plan Changes, dated November 2016.

92. The updated notice advised Participants in relevant part with regard to the Sears Stock Fund that:

Reminder: Change Coming to Sears Holdings Corporation Savings Plan ("Savings Plan")

A Recap of What's Changing Starting January 1, 2017

As previously announced, the Sears Holdings Stock Fund that is part of the Savings Plan (the "Stock Fund") will be closed to new investments effective January 1, 2017. Here's a brief reminder of what this change will mean to you:

- **Contributions and Fund Transfers:** You will not be able to allocate contributions or transfer amounts from other Savings Plan investment options to the Stock Fund.
- **Current Stock Fund Balance:** Any existing Stock Fund balance will remain in place as long as you are a participant unless you voluntarily transfer assets out of the Stock Fund. Any dividends will also continue to be invested in the Stock Fund. If you transfer any amount in the Stock Fund to a different investment option, you will not be able to move that amount back into the Stock Fund.
- **Investment Elections:** If you have elected to invest any new contributions and/or loan repayments to the Stock Fund, you

should review and change that election. If you do not change existing Stock Fund investment elections, then starting January 1, 2017, amounts that would have been invested in the Stock Fund will instead automatically be invested in the Target Retirement Fund appropriate for your current age. ...

Plan Administrator Notice Re Savings Plan Changes, dated November 2016.

93. The closure of the Sears Stock Fund, effective January 2017, was also memorialized in the 2017 SMM, which provided as follows in relevant part:

NOTICE OF CHANGES TO THE SAVINGS PLANS

- **The Sears Holdings Corporation Stock Fund that is part of the Savings Plan (the “Stock Fund”)**: This fund will be closed to new investments. Starting January 1, 2017:
 - You will not be able to allocate contributions or transfer amounts in other investment options to the Stock Fund.
 - Any existing Stock Fund balance will remain in place unless you voluntarily transfer assets out of the Stock Fund. If you transfer any amount in the Stock Fund to a different investment option, you will not be able to move that amount back into the Stock Fund. However, you will be able to leave balances in the Stock Fund as long as you are a participant.
 - If your investment election includes the Stock Fund, you will need to change that, effective January 1, 2017. Otherwise, starting January 1, 2017, all amounts that would have been allocated to the Stock Fund, including contributions, automatic rebalancing, and loan payments, will be automatically invested in the Target Retirement Fund appropriate for your current age. The change will apply to all plan participants.

* * *

This Notice of Changes to the Sears Holdings Savings Plan and the Sears Holding Puerto Rico Savings Plan is intended to constitute a summary of material modifications with respect to the Savings Plans, in accordance with the applicable regulations of the Employee Retirement Income Security Act (ERISA), as amended.

Id.

94. According to the Savings Plans' filings, the Master Trust holds shares of Sears Stock. *See, e.g.*, 2016 Sears Plan Form 11-K at 18. Specifically, at December 31, 2015, the Master Trust held 1,520,196 shares of Sears Stock with a fair value of \$31.3 million and a cost basis of \$61.1 million, and at December 31, 2014, the Master Trust held 1,450,270 shares of Sears Stock with a fair value of \$47.8 million and a cost basis of \$69.3 million. *See id.*

95. The reported market price of Sears Stock fell from \$38.10 on May 22, 2014 (the beginning of the Relevant Period) to \$8.87 on August 8, 2017—a decline of over 76% (Sears Stock has declined by almost 95% since its high close of \$174.47 on April 17, 2007, prior to the start of the Relevant Period).

VII. CLASS ACTION ALLEGATIONS IN THE ALTERNATIVE

96. Plaintiff brings this action derivatively pursuant to § 502(a)(2) and (3) of ERISA, 29 U.S.C. § 1132(a)(2) and (3). Plaintiff brings this action derivatively on the Plan's behalf pursuant to ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132, and, in the alternative, as a class action pursuant to Rules 23(a), (b)(1), and/or (b)(2) of the Federal Rules of Civil Procedure on behalf of herself, the Plan, and the following class of similarly situated persons (the "Class"):

All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Savings Plans at any time between May 22, 2014, and the present (the "Relevant Period") and whose Plan accounts included investments in Sears Stock.

97. Given ERISA's distinctive representative capacity and remedial provisions, courts have observed that ERISA litigation of this nature presents a paradigmatic example of a Fed. R. Civ. P. 23(b)(1) class action.

98. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at

this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are thousands of Sears employees who participated in, or were beneficiaries of, the Savings Plans during the Relevant Period whose Plan accounts included Sears Stock. For example, at the beginning of Plan year 2015, there were 207,310 Participants in the Sears Plan and 7,545 Participants in the Sears PR Plan. *See* 2015 Sears Plan Form 5500; 2015 Sears Puerto Rico Plan Form 5500.

99. **Commonality.** At least one common question of law or fact exists as to Plaintiff and all members of the Class. Indeed, multiple questions of law and fact common to the Class exist, including, but not limited to:

- whether Defendants each owed a fiduciary duty to the Savings Plans, Plaintiff and members of the Class;
- whether Defendants breached their fiduciary duties to the Savings Plans, Plaintiff and members of the Class by failing to act prudently and solely in the interests of the Savings Plans and Participants;
- whether Defendants violated ERISA;
- whether the Plan, Plaintiff, and members of the Class have sustained damages and, if so, what is the proper measure of damages.

100. **Typicality.** Plaintiff's claims are typical of the claims of the members of the Class because the Plan, Plaintiff, and the other members of the Class each sustained damages arising out of Defendants' wrongful conduct in violation of ERISA as complained of herein.

101. **Adequacy.** Plaintiff will fairly and adequately protect the interests of the Savings Plans and members of the Class because she has no interests antagonistic to or in conflict with

those of the Savings Plans or the Class. In addition, Plaintiff has retained counsel competent and experienced in class action litigation, complex litigation, and ERISA litigation.

102. Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the action, or substantially impair or impede their ability to protect their interests.

103. Class action status is also warranted under the other subsections of Rule 23(b)(1)(A) and (b)(2) because: (i) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; and (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

VIII. FACTS BEARING UPON DEFENDANTS' FIDUCIARY BREACHES

104. On March 21, 2017, Sears announced that the Company had “substantial doubt” of its ability to continue as a going concern. Sears annual report filed on Form 10-K, dated March 21, 2017 (“March 21, 2017 Form 10-K”). This announcement was hardly a surprise. As the financial press noted the following day, “[s]truggling retailer [Sears] admitted on Wednesday what the rest of Wall Street has known for a long time: it’s quite likely Sears is doomed.” “The End Is Near For Sears Holding Corp (SHLD),” *U.S. News & World Report*, March 22, 2017 (“March 22, 2017 *U.S. News & World Report*”).

105. Indeed, by the time Sears made its “going concern” announcement, the once storied Company had been in a steady decline for a number of years, facing a number of fundamental problems that threatened its very survival. As noted by the press, the Company’s March 21, 2017

announcement that it may go out of business came “after it had gone through a long list of asset sales, loans and cost savings initiatives Sears has either previously engaged in, is currently engaged in, or is planning to engage in to shore up its balance sheets and stop the bleeding.” March 22, 2017 *U.S. News & World Report*.

106. As the Company acknowledged in its March 21, 2017 announcement, and as the press had noted, the measures Sears had taken to stay afloat may not suffice:

Translated, Sears is essentially saying that even though it’s taken a series of extreme steps to boost its liquidity -- including selling its Craftsman brand, spinning off stores into a real estate investment trust, and vowing to trim costs by \$1 billion this year – it’s very possible those efforts leave Sears still cash-strapped and looking for a capital injection ... and it’s still possible no one will want to help Sears when that day comes.

March 22, 2017 *U.S. News & World Report*.

107. The March 22, 2017 *U.S. News & World Report* explained the Company’s impending demise as follows:

Sears used to be one of the great American corporate success stories, and for many decades it was a reliable cash cow. ***However, the company’s been woefully unable to the modern retail environment***, and even big-box retailers like Wal-Mart Stores and Target Corp. became a competitive issue for Sears by the 1990s.

In the 2000s, with Amazon.com now flexing its e-commerce muscles, Sears started to fall apart. In 2005, billionaire hedge fund guru and Kmart chairman Eddie Lampert, who had a huge stake in Kmart after leading it out of Chapter 11, arranged the Kmart-Sears merger.

Since then, Lampert has been stripping Sears to its bones.

In November, Mark Cohen, a former chairman and CEO of Sears Canada and current Columbia Business School professor, described Lampert’s actions as outright “asset stripping.”

* * *

In November, Cohen thought that Lampert would eventually strip Sears down to nothing, but he insisted that process could take many, many years, saying, “This is gonna be the longest-running death in the retail industry in its history. He’s selling off the fingers, the toes, there’s an arm that’s come off, there’s another one yet to be harvested. The corneas are gone, one of the kidneys is gone – but it’s still got a heartbeat.”

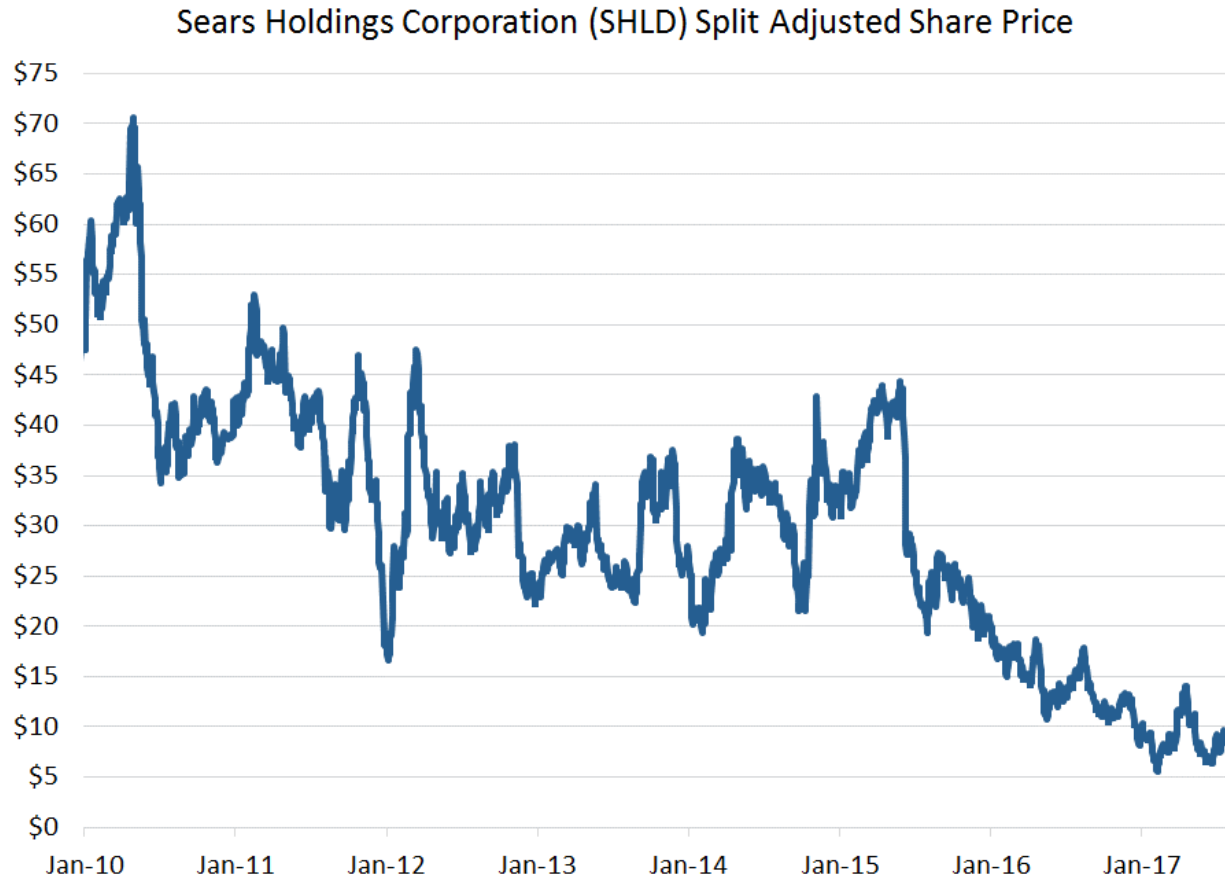
Id. (emphasis added).

108. Equally unsurprisingly, the Company’s stock price had for years been moving in tandem with the Company’s continuously worsening fortunes. As noted by the *U.S. News & World Report*:

Still having a heartbeat is no consolation for investors in the struggling retailer who watched SHLD stock lose 13 percent of its value in the first hour of trading on Wednesday. ***Down 47 percent in the last year, 90 percent in the past five years, and 95 percent in the last 10 years, the stock chart has been trending the same direction as revenue and earnings: down.***

Id. (emphasis added).

109. As shown by the following chart, Sears Stock had been on the decline since 2010, well before the start of the Relevant Period:



110. What is more, as discussed in further detail below, and as was known to the Defendant-fiduciaries, both before and during the Relevant Period, the Sears Stock Fund had continuously failed to as much as meet its stated performance benchmark,⁹ the S&P 500 Retailing Index.

⁹ According to the October 2016 Fee Disclosure Statement (defined below), a “benchmark is typically a market index that tracks general market performance of similar types of investments. For instance, the S&P 500 Index is commonly used as a benchmark for large-cap stocks.” *Id.* at 7.

Table 1—Variable Return Investments ¹								
Name/ Type of Option	Annualized Investment Returns as of 12/31/15				Benchmark			
	1 yr.	5 yr.	10 yr.	Since Inception	1 yr.	5 yr.	10 yr.	Since Inception
Company Stock								
Sears Holdings Corporation Stock	-31.2%	-14.2%	-11.5%	0.4%	25.6%	21.8%	12.3%	12.0%
					Benchmark: S&P 500 Retailing Index			

111. The Company's well-publicized dire condition and the significant correspondent decrease in the value of its stock could not have gone unnoticed by anyone charged with monitoring the Company stock, such as the Defendant-fiduciaries here, entrusted with the stewardship of the Sears Stock Fund in the Savings Plans. Yet, during the Relevant Period, in abrogation of their fiduciary duties towards the Savings Plans, Defendants failed to timely undertake appropriate actions to protect the Savings Plans from the massive losses that ensued from the Plans' holdings of Sears Stock. Defendants should now answer for their fiduciary failures.

A. End Of Company Match And Other Events Preceding The Relevant Period

112. On December 30, 2008, well before the beginning of the Relevant Period, Sears issued a memo to its employees, announcing the suspension of the Company's matching contributions to the Savings Plans to Participants, effective January 31, 2009. The memo, from the Company's then interim CEO, Bruce Johnson, provided in relevant part:

In this difficult economy and fast changing retail environment, we need to remain flexible and focused on improving our operating metrics and continuously look for ways to reduce expenses. Remaining committed and steadfast in our attention to our financial priorities – improving margins, tightly controlling expenses and focusing on cash generation should position us to perform well when the economy improves.

...Effective Jan. 31, 2009, we will be suspending the company matching contributions to the U.S. and Puerto Rico 401(k) Savings Plans. As we continue to look for ways to control expenses, this change is expected to provide significant savings to the company

during the 2009 fiscal year. ***This change will remain in effect until our financial performance improves to a level adequate to support reinstating the match benefit.***

Memo to Sears Holdings Associates from Sears Interim CEO and President Bruce Johnson, dated December 30, 2008 (emphasis added).

113. As such, even prior to the beginning of the Relevant Period, the Company had acknowledged that it was facing business challenges and needed to improve its financial performance. As cited above, the Company represented that the suspension of its matching contributions would remain in effect until its financial performance improved to a level adequate to support reinstating the match. Notably, to this date, the Company has not reinstated its match.

114. Indeed, Sears last turned an annual profit in 2011. As discussed below, the Company's other financial indicators have long been no less troublesome.

115. The adverse developments plaguing Sears have been well-documented and widely publicized. Warnings by analysts following the Company and reports in the financial press concerning the Company's poor financial condition and its flailing prospects abounded well prior to the start of the Relevant Period. Many of these warnings were nothing short of dire. For example, in early 2012, *Forbes* reported that a Credit Suisse analyst following Sears, likened the Company to a sinking ship:

When an equity analyst issues a report like this one from Credit Suisse's Gary Balter, it's time to take notice.

Balter thinks management is stripping Sears Holdings of its assets.
As *Crain's Chicago* notes:

...when one likens a company to both a sinking ship and a foreclosed house, it's pretty much the equity analysis equivalent of a Charlie Sheen outburst (without the drugs).

Last week Sears announced it was closing more stores and separating the Hardware, Hometown and Outlet businesses.

Management expects this to generate \$400 to \$500 million, “unlocking the value of those businesses.” It’s also selling 11 stores for \$270 million, generating cash from real estate. Along with inventory reductions, Sears Holdings says it will further strengthen its balance sheet by \$1 billion.

But that’s just getting money out of an otherwise failing venture, since Sears has yet to demonstrate any retail prowess, as in selling goods and services.

* * *

I know there are people within Sears that think reporters are being too harsh. Or that since the company has cash, it’s in good shape. But ***Sears Holdings isn’t generating cash from retail operations and hasn’t in a long time and when analysts like Balter say things like “I now see that returning to positive operating cash flow levels is likely impossible, so let me keep the ship afloat while I dispose of the dinnerware and other valuable items before abandoning” - it rings a little too true.***

Is Sears trying to appear like a stable company working on its retail problems while management strips it of all value? Or are they just trying to buy time before making some kind of effort to right the retail stores?

D’Ambrosio sent these words to employees, who are probably exhausted with worry over their jobs, future and retirement accounts:

We, as a team, are capable of doing much better and together we’re going to turn around our company. You are critical to that success. We begin to change the course of our company...right now.

How?

“Analyst On Sears: Like a Sinking Ship,” *Forbes*, February 29, 2012 (emphasis added).

116. In another example of a serious warning that Defendants failed to heed, on May 8, 2012, *Forbes* reported, in a prophetic expose entitled “Sears Holding (SHLD) – An Opportunity Missed – A Tragedy in the Making,” as follows:

I have known Sears Holding (SHLD) and its predecessor companies Sears Roebuck and Kmart for many years. I appreciated the strength

of Sears as a retailer of hard lines including Kenmore appliances, Die Hard Batteries, and Craftsman tools – three leading brand names that were exclusive with Sears. ***Most of the luster of the company is gone and recent reports worry me and I wonder if the company can reverse its course and will survive.*** Essentially I ask myself if Sears is a dynamic merchandising company or an albatross in the making.

The distinguished history of this mail order house that turned into the largest department store company by building stores across the United States had the trust of its customers. Men like Edward Telling, Edward Brennan and Arthur Martinez gave new momentum to the company that eventually allowed for selling more fashion and attracting more women shoppers to the stores.

By promoting the “Softer Side of Sears” and bringing to the store brilliant department store merchants like Robert Mettler the company veered away from its historic hard line path. Fashion model Cheryl Tiegs was the public spokeslady for the company. The effort to bring to the store more women shoppers worked. ***However, profits lagged, since management ignored the growth of big box low-margin retailers like Walmart, Home Depot, Lowe’s, Costco and Sam’s. Sears was competing with small hardware stores (Ace, True Value etc.) rather than developing an aggressive attack on the competition.***

In 2005 Edward S. Lampert merged Sears and Kmart into Sears Holding. Ed Lampert is the founder and chairman of ESL Investment, a Connecticut based private hedge fund. It was a puzzling combination. I believe that ***Lampert is a portfolio manager who understands real estate values more than the merchandising potentials of his company in a very hostile and competitive retail environment.*** Lampert is an enigma to me. He understands merging companies but avoids talking to analysts and investors who would support his quest. I think that he believes he can leverage his investments by selling periodically some of his assets, as he did recently.

I see Edward Lampert as an investor. Yet, I have no idea how involved he is about the content of his stores. I have known the company since Arthur Wood was president in the 1970’s, and my current observations are culled strictly from visiting stores.

Here are some of my observations:

1. ***Many Sears and Kmart stores that I visited recently are dingy and in need of upkeep.*** Stores have to be kept up. I wonder if the budget for renovations is being kept to a minimum.

2. Fashion merchandise has to be trendy. Lands' End is much too conservative – at worst it is dull. The recent dress catalog was too restrained for my taste. Yet, Sears has many private labels that have great appeal. They include Jaelyn Smith, Joe Boxer, apostrophe, Everlast, Canyon Blue and others. A fashion message could be developed – be it Western or lifestyle.

3. There has to be proprietary merchandising. Macy's carries many excellent private label brands that are exclusive with that company. By selling Kenmore, Die Hard and Craftsman to other competitors such as Costco and Home Depot. It robs the company of exclusivity and growth potential.

4. ***Innovation is important. I see very weak understanding of the female customer and her needs. She works and does much of her shopping on line from home. Sears must bring her back to the store with special events, special promotions, attractive values and exclusive looks.***

5. ***The company must be creative. Retailing is always changing and Sears must be on the forefront with creative ideas that will bring customers back to the store.***

Last week the company announced that the first quarter result (ended April 28) was profitable (despite a continuing decrease of sales in comparable stores), because Sears Holding sold 14 important Sears stores in the quarter for a profit of \$270 million and \$170 Million Canadian. The sale of quality locations in the US and Canada will reduce the future value of the company. Ed Lampert acted in the interest of his investors, disregarding the future of the merchandising momentum. I am sure that he will continue to sell more stores and book the profit as part of his earnings report. However, ***I see the merchandising swan slowly dying.***

(Emphasis added).

117. Defendant Lampert, who began his tenure as the CEO of the Company in early 2013, failed to effectuate a turn-around of the Company. Months within Defendant Lampert's

appointment, on August 22, 2013, *Daily Beast* reported on, *inter alia*, the continued decline of Sears Stock, in an article entitled “Sears Continues its Long, Sad Decline,” as follows:

And you thought JCPenney had problems?

Sears Holdings, which runs Sears and K-Mart, ***has reported yet another dismal quarter. The company posted losses of \$1.46 a share on revenue of \$8.87 billion. Overall sales were off 6.3 percent from the year-before quarter.***

Sears Holdings is run by the reclusive hedge-fund billionaire Edward Lampert. His reputation was so polished a financial genius that when he got his hands on the already struggling retailers in 2004 and lashed them together, Wall Street applauded and the stock performed accordingly.

But it turned out that Lampert didn't have many great ideas on how to turn around the tired retailing concepts of Sears and K-Mart. Instead, sales fell year after year. Strategies shifted rapidly and fickle Wall Street grew tired of the wounded “nobody gets me” routine. As seen in the chart, the stock, once above 100 a share, is now below 40.

The one consistent strategy on the part of Lampert has been stock buybacks (rather than investments in stores). ***Given the consistent decline in the value of the shares***, the strategy of buying your own stock—rather than paying dividends or buying in other companies—has been a loser. ***The continuing slide of Sears and K-Mart into retailing irrelevancy has resulted in a significant reversal of fortune—and reputation.*** The man who once talked himself out of a kidnapping has been unceremoniously dubbed the worst CEO of the year and made lists like “The Five CEO’s Who Should Already Have Been Fired.”

For years, investors held out hope that Lampert had a secret plan for reversing the fate of middle- and lower-market big-box retailing. Financial engineering might liberate new sources of capital. If all else failed, perhaps the company could be a real-estate play. Perhaps his efforts to run the company as a corporate version of The Hunger Games would bring out the best in managers.

But investors have been perpetually disappointed. On Thursday, before the NASDAQ mercifully got shut down by a technology glitch, the stock of Sears was off 8 percent, putting the stock below 40, and at the same level it was in the spring of 2004.

The lack of turnaround at Sears is yet another example of the flaws inherent in the genius-hedge-fund-guy-will-make-it-all-better strategy. Exhibit B, of course, is Bill Ackman, whose expensive effort to remake JCPenney in his own image has ended in tears.

(Emphasis added).

118. Indeed, it had become evident prior to the Relevant Period that the Company had changed, and that the change did not bode well for its prospects. On October 31, 2013, *Forbes* commented on the fundamental change of the Company's business from that of a retailer to that of a holding company, with different goals and objectives, in an article entitled "Sears is Not A Retail Story, It's A Holding Company Holding A Fire Sale," as follows:

It may be time to simply face the hard truth that journalists, analysts and shoppers have got Sears all wrong. ***This isn't a retailer, not anymore.***

Technically, it has stores and sells merchandise in the billions of dollars. But those ***sales have been declining for a decade as have assets.***

Sears has been closing stores and now looks to spin off more parts of its business. Stores are old and often untended, brand equity in flagship private labels is languishing and management has all but given up on finding a leader with real retail and merchandising expertise.

Sears isn't really a retail company anymore. In fact, we should feel a little silly for even thinking of it that way.

Since hedge fund manager Eddie Lampert took control of Sears and merged it with Kmart to form Sears Holdings in 2003, ***the company has become little more than way for Lampert to create equity for shareholders like himself. Lampert holds close to 60% of Sears Holding's outstanding shares, and turning assets into cash benefits him directly. It doesn't build a better retailer.***

* * *

But corporations do fall into categories and are evaluated by the parameters of the industries in which they operate. ***Evaluating***

Sears by the rules of retail yields some pretty dire conclusions. As a retailer, Sears is pretty much done.

All that's left is to ravage the bones. Or, as Lampert is doing, sell off the parts.

Gone are Sears Hometown and Outlet stores. Gone is nearly half its ownership in Sears Canada with four more locations sold, including a flagship store in Toronto. Gone, soon, may be Lands' End and Sears Auto Centers.

There hasn't been an investment in Sears for years and stores are sad. But stores don't matter to an investor that seeks returns in other ways.

Lampert can't just come out and say this is not a retail story. That won't get him anything but reduced asset value. But *it may be time to face facts -- Sears is not a retail story. It's a holding company holding a fire sale.*

(Emphasis added).

119. The sea-change in the Company's business profile, that as alleged above, had essentially transformed the nature of the Company's business from that of a retailer to that of a holding company, and the ensuing negative consequences for the Company that were reflected in its sinking stock price, rendered continued investment in Sears Stock imprudent for the Savings Plans, well before the Relevant Period.

B. The Company Continues To Unravel During The Relevant Period As Bankruptcy Looms

120. The Relevant Period begins on May 22, 2014, when Sears once again issued dismal quarterly results, this time for its first fiscal quarter of 2014. By this time, the Company, stripped down of some of its best-known businesses, was a mere shadow of its former self.

121. The day prior, on May 21, 2014, *The Motley Fool* questioned the reasonableness of continuing to hold Sears Stock, in an article entitled "Sears Holdings Corp. Earnings: How Long Can the Red Ink Last":

Investors expect losses from Sears for the foreseeable future. ***Is there any reason to hold the shares?***

On Thursday, Sears Holdings (NASDAQ:SHLD) will release its quarterly report, and ***investors remain unconvinced that the well-known retail giant can pull itself out of its current tailspin.*** Even as fellow retailers Target (NYSE:TGT) and J.C. Penney (NYSE:JCP) go through struggles of their own, they nevertheless show signs of potential improvement, while ***Sears Holdings appears resigned to ongoing losses and falling revenue.***

With both its namesake Sears stores and the Kmart chain under its corporate umbrella, Sears Holdings at one time seemed like a premier player in the retail space. Yet despite ongoing efforts to unlock value, ***Sears has continued to struggle with its core retail business, and many investors now expect that the company is positioned more for a slow, steady liquidation of assets than for true growth.*** Let's take an early look at what's been happening with Sears Holdings over the past quarter and what we're likely to see in its report.

* * *

...Sears Holdings faces even larger problems than the ongoing sea of red ink suggests. Even Sears' successes haven't led to a permanent solution for the retailer, as initiatives like the Shop Your Way loyalty program raise future concerns about customers growing reliant on additional discounting. Rival J.C. Penney has struggled to get shoppers to stop counting on promotions in order to shop, and Sears should avoid going down the same path if at all possible. Similarly, attempts to boost online sales at Sears have borne some fruit, but ***10% growth in e-commerce doesn't compare well with much faster growth trends that Target and other players in the retail industry have seen.***

Moreover, with its spinoffs, Sears Holdings seems to be shedding its best chances for survival. In April, Sears finished the spinoff of its Lands' End clothing line, amid pressure that the association of the well-known brand with Sears was actually reducing its value. Earlier this month, Sears said it would sell off its majority stake in its Sears Canada division, further eliminating a source of profits. By contrast, J.C. Penney is doubling down on its retail operations, and it's even started to see some signs of a rebound, albeit from very low levels.

...As its best-known businesses get separated from the corporate entity, *Sears Holdings might well end up as a mere husk, leaving its spun-off divisions to fend against J.C. Penney, Amazon.com, and the rest of the retail industry.*

(Emphasis added).

122. Indeed, the results issued by Sears for its first fiscal quarter of 2014 were nothing short of devastating. As *Reuters* reported on May 22, 2014, in an article entitled “UPDATE 2-Sears loss widens as discounts fail to arrest fall in sales”:

May 22 (Reuters) - *Sears Holdings Corp posted a bigger loss for the first quarter as the struggling retailer failed to arrest a fall in sales despite offering heavy discounts to woo shoppers.*

Shares of the company, which operates Sears department stores and the Kmart discount chain, fell 4 percent in premarket trading.

Sears, controlled by hedge fund billionaire Eddie Lampert, *has been shedding assets and closing stores as it battles the operating losses and weak sales that have plagued the company since 2005, when the two chains were merged.*

Unappealing merchandise and poor store layouts have pushed shoppers away from Sears and Kmart to Wal-Mart Stores Inc. and Target Corp, analysts say.

“The customer experience at Sears and Kmart is basically horrific,” Brian Sozzi, chief executive of Belus Capital Advisors, said on Thursday.

Sears was once the largest retailer by revenue in the United States, but it lost the crown to Wal-Mart in 1990.

Sears has been trying to move away from relying on stores for revenue to focus on membership through its Shop Your Way program, which integrates online shopping.

The company said that sales to Shop Your Way members increased to 74 percent of eligible sales in the first quarter from 68 percent a year earlier.

Sozzi, however, said the program was doing more harm than good by offering discounts on already promoted, low-margin items.

“(Sears is) not driving high quality sales and they’re limiting the ability to charge a full price. In a way, they’re begging for customers by giving away their products,” he said.

The company said last week it was exploring a sale of its 51 percent stake in Sears Canada Inc.

Sears said on Thursday that a potential stake sale could raise about \$730 million in cash at current market value.

On Wednesday, Sears Canada reported its steepest fall in quarterly sales in almost five years.

Sears said it would close 80 stores or more in the year ending January. The retailer operated about 1,900 Sears and Kmart stores in the United States at the end of the first quarter.

U.S. comparable store sales fell 1 percent in the quarter ended May 3.

Comparable store sales declined 2.2 percent at Kmart stores in the United States, but rose 0.2 percent at Sears stores due to higher demand for home appliances and home products.

Sears said its gross margin fell to 23.2 percent from 25.5 percent.

Net loss attributable to shareholders widened to \$402 million, or \$3.79 per share, from \$279 million, or \$2.63 per share, a year earlier.

Revenue declined 6.8 percent to \$7.88 billion, but came higher than the average analyst estimate of \$7.71 billion, according to Thomson Reuters I/B/E/S.

Sears shares were trading at \$35.04 before the bell. The stock has fallen about 8 percent this year to Wednesday’s close.

(Emphasis added).

123. By this time, as noted below, Sears had posted **29** consecutive quarters of revenue declines, and the analysts’ confidence in the Company had sunk. As reported by *Bloomberg*

Business on the same day that Sears issued its first fiscal quarter 2014 results, May 22, 2014, in an article entitled “Sears’s Pool of Analysts Shrinks as Morningstar Exits”:

Morningstar Inc. has dropped coverage of Sears Holdings Corp., leaving only a handful of analysts following a company that was once the largest U.S. retail chain.

Retail analyst Paul Swinand discontinued coverage as of March 18, according to a company note. “We provide broad coverage of more than 1,700 companies across more than 140 industries and adjust our coverage as necessary based on client demand and investor interest,” the note said.

Before dropping coverage, Morningstar had rated Sears “no moat,” the lowest of three rankings that refer to a company’s ability to fend off competitors. The retailer, which operates Sears and Kmart stores, has posted 29 straight quarters of revenue declines including results today in which it reported a wider net loss than a year earlier.

“One of the keys to finding superior long-term investments is buying companies that will be able to stay one step ahead of their competitors, and it’s this characteristic -- think of it as the strength and sustainability of a firm’s competitive advantage -- that Morningstar is trying to capture with the economic moat rating,” according to the Chicago-based company.

Shares of Sears, based in Hoffman Estates, Illinois, rose 4.2 percent to \$38.10 at the close in New York. The stock has dropped 4.1 percent this year.

Sears’ net loss for the first quarter was \$402 million from a loss of \$279 million a year earlier, as its sales slump stretched into a seventh year. The company, run by hedge-fund manager Edward Lampert, has invested in online and is shutting stores and may seek buyers for its auto centers and Canadian unit. It spun off its Lands’ End apparel business last month.

Kmart merged with Sears Roebuck in 2005 in a \$12.3 billion takeover -- a deal that Lampert said would create a company with enough scale to compete with Wal-Mart Stores Inc. Instead, the retailer has suffered from declining shopping-mall traffic and the rise of online competitors such as Amazon.com Inc.

(Emphasis added).

124. In commenting on the Sears' results for its first fiscal quarter of 2014, *24/7 Wall Street* reported on May 22, 2014, in an article entitled "Sears Shows That It May Never Be Profitable Again," that "as more pieces of Sears are sold off, the bits that are left will not interest many investors." The article concluded by noting that "[w]e are watching an American icon slip into a coma." *Id.*

125. Unfortunately, not only was the Company "slip[ping] into a coma," but the Defendant-fiduciaries were also asleep at the wheel. It should have been manifestly clear to the Defendant-fiduciaries by at least the beginning of the Relevant Period, if not earlier, that the Sears Stock Fund was no longer a prudent investment for the Savings Plans. Numerous objective metrics, including the Sears Stock Fund's inability, quarter after quarter and year after year, to meet its stated performance benchmark, as well as publicly available Company-specific data related to its failing business and operations, and negative analyst and financial media reports, all pointed to the patent imprudence of continuing to maintain the Sears Stock Fund as an investment option for the Savings Plan, when other alternatives were available.

126. Yet, in abrogation of their fiduciary duties, Defendants continued to permit the Savings Plans to offer the Sears Stock Fund as an investment option, and to allow Participants to both hold and purchase additional shares of Sears Stock with their retirement moneys.

127. In the meantime, the Company continued on its downward course, while devastating the retirement savings of its employees in the process. On August 21, 2014, *USA Today* reported in an article entitled, "Sears reports 9th straight quarterly loss" that:

Sears Holding has extended its string of unprofitable quarters to nine, losing \$574 million in its fiscal second quarter.

The parent company of Sears and Kmart said Thursday that its quarterly loss widened from \$194 million a year ago. The loss per share was \$5.39 a share, compared with \$1.83.

Revenue fell \$858 million to \$8 billion in the quarter.

* * *

Sears shares closed down 7.15% to \$33.38.

In a statement, Sears Chairman and CEO Edward Lampert, who also controls the parent of Sears and Kmart, called the results “unacceptable”....

* * *

Revenue fell sharply last quarter as Sears spun off its Lands’ End stores in the first quarter and closed almost 200 others in the past 12 months. ...

In the company statement, Chief Financial Officer Rob Schriesheim said the company is looking for ways to deal with its struggling Canadian operation, in which it had a 51% stake, “including a sale of our interest or Sears Canada as a whole.”

Comparable-store sales at Sears Canada fell 6.8% with the year-ago quarter, accounting for \$47 million of the \$140 million decline in revenue for the quarter. Store closings and declines in the home services business also contributed to the revenue loss.

(Emphasis added).

128. A few weeks later, on September 10, 2014, *Barron’s* reported in an article entitled “Fitch Downgrades Sears To Deepest Junk Ratings,” that:

The downward spiral for Sears Holdings (SHLD) has just reached the bottom as far as credit ratings go. Fitch Ratings today decided that Sears wasn’t even fit for a triple-C rating - which usually signals pretty dire financial problems - and stripped it of one C, leaving it with a double-C rating, essentially the sub-basement of the speculative-grade ratings scale. From Fitch:

The magnitude of Sears’ decline in profitability and lack of visibility to turn operations around remains a significant concern. EBITDA for Sears Holdings Corporation is expected to be negative \$1 billion in 2014 and potentially worse in 2015, after turning negative \$337 million in 2013.

Fitch expects top-line contraction of around 9% to 10% in 2014 due to estimated domestic comparable store sales of negative 1%-negative 2%, loss of Lands' End business (4.3% of 2013 consolidated sales), and ongoing store closings. Gross margins are expected to contract another 200 bps to 22%, on top of the 220 bps contraction in 2013. ***Fitch does not expect any catalysts in the business that will stem the rate of decline.***

Fitch says the company's cash burn rate is also a "significant concern" and says its funding options "may not be enough to support operations beyond 2016"

* * *

Fitch says even if Sears can execute some combination of asset sales, debt issuance, inventory reduction, and real-estate transactions to generate cash, it's still running out of time:

Should Sears even be able to execute on a number of these fronts and generate \$4.0 to \$6 billion in proceeds, given the high rate of cash burn in the business, these actions would take them through 2016. ***As a result, Fitch expects that the risk of restructuring is high over the next 24 months. ...***

(Emphasis added).

129. On December 2, 2014, *InvestorPlace* warned investors, in an article entitled "SHLD: Don't Even Consider Buying Sears," that:

Don't count on Sears' next earnings report to turn things around either.

Sears Holdings Corp (SHLD) is scheduled to release its third-quarter earnings report this Thursday. Sears' had a tough year, but let's find out if SHLD stock's earnings forecast looks promising.

* * *

Sears – Earnings Rundown

Analysts' estimates for Sears' third-quarter earnings report look bleak. Sears is expected to post a loss of \$3.31 per share, even worse than the loss of \$2.95 per share year over year.

Revenue is estimated to be \$6.88 billion, representing a 16.8% drop over last year. Plus, Sears doesn't appear that it will benefit from any holiday cheer, either. For the fourth quarter, Sears is expected to post a loss of \$2.71 per share on \$8.89 billion in revenue.

Sears – Current Ratings

For the better part of the past year, Sears stock has remained stuck at a “sell” rating mostly due to weak institutional buying pressure. SHLD stock currently earns a “D” for its Quantitative Grade.

Sears' fundamentals could use some serious improvement. Of the eight fundamental metrics I graded SHLD on, five earned failing grades: Sales growth, earnings momentum, analyst earnings revisions, cash flow and return on equity. Meanwhile, operating margin growth, earnings growth and earnings surprises have lackluster “C” grades. Sears earns a “D” for its overall Fundamental Grade.

As of this posting, Dec. 2, I consider SHLD a “D-rated sell.” I don't see any upside ahead for Sears as we head into its next earnings report.

(Emphasis added).

130. On July 6, 2015, *The Motley Fool* reported in an article entitled “Why Shares of Sears Holdings Corp. Crashed in June,” that:

With its most valuable assets being spun off, investors punished the stock in June.

What: *Shares of struggling retailer Sears Holdings (NASDAQ:SHLD) collapsed by 37.8% in June, according to S&P Capital IQ data. A lackluster earnings report, along with the commencement of a rights offering for Sears' spinoff of its real estate assets, weighed heavily on the stock.*

So what: *Sears posted a smaller loss than anticipated during the first quarter, losing only \$2 per share, \$0.59 better than the average analyst estimate. But revenue plunged by 25.4% year over year, as comparable-store sales continued to slide (a 14.5% drop at Sears stores and a 7% decline at Kmart locations).*

The company's balance sheet also further deteriorated during the quarter. Sears' cash on hand fell to \$286 million from \$831 million at the same point last year, and the company's total debt, including pension obligations, rose to \$6.22 billion.

Sears' precarious financial position led management to earlier this year announce a spinoff of its real estate assets into a REIT, and the rights offering for Seritage Growth Properties was announced one day after the company's earnings report. Sears expects to raise around \$2.7 billion from the move, which would go a long way toward shoring up the company's finances. But investors are clearly worried Sears will simply blow through this additional cash.

Now what: Sears has shown no sign that its retail operation is improving, and spinning off its real estate means Sears' most valuable asset, which was likely holding up the company's stock value, is now gone. What's more, Sears' costs will rise as it leases the stores that it previously owned, putting further pressure on the balance sheet.

What remains after the spinoff is a failing retail company, albeit one that generated about \$31 billion of revenue in 2014. Sears posted negative free cash flow of \$1.66 billion last year; at that rate, the influx of cash from the REIT spinoff won't last long. There's little reason to believe the company can turn around its stores anytime soon, and while the spinoff buys Sears some time, it will likely only act to delay the day of reckoning.

(Emphasis added).

131. The following month, on August 8, 2015, *The Motley Fool* reported in an article entitled "Why Sears Holdings Corporation Stock Fell 19% in July," that:

The ailing retailer's stock continued to decline in July as investors grow more pessimistic.

What: *Shares of Sears Holdings Corporation (NASDAQ:SHLD) continued to slide in July, dipping 19% according to data from S&P Capital IQ.*

So what: As the chart above shows, *Sears' slide happened gradually over the month of July, and is a continuation of a sell-off that began in June, which in total has shaved off nearly 50% of the stock's value. Concerns about the company's ability to*

endure have mounted after years of significant losses and declining sales. The slide began with another stinker of an earnings report as the retail parent of Sears and Kmart said comparable sales dropped 14.5% at Sears locations and 7% at Kmart.

Though much effort has been put into unlocking value for shareholders by spinning off such entities as Lands' End, Sears Hometown & Outlet stores, and a portion of Sears Canada, *neglect for the core retail brand has overwhelmed the stock and it now seems past the point of return.* Sears' latest move was to create a REIT called Seritage, which would buy Sears' property and lease it back to the retail business. While this is a way for the company to generate cash in the short term, it only adds another unnecessary expense in the future.

Now what: Sears' prospects have been fading for a long time. The stock's slide has been volatile, but the downward slope has remained over the last five years. Investors have pointed to the company's assets in its brand-name properties and real estate holdings, but most of those have been spun off by now and *the core brand has only gotten worse.*

In fiscal 2015, the company's operating loss hit \$1.6 billion, but CEO Eddie Lampert continues to tout the importance of its rewards program and other initiatives that are unlikely to reverse the decline. Big-box retailers across the board are struggling, but Sears has bungled in neglecting its brand and basic retail concepts like store maintenance, which has turned customer perception sour.

At this point, Sears' outcome seems terminal. Comparable sales can only fall for so long before the business implodes, and with over \$6 billion in debt and little cash on the books, there is little liquidity left.

(Emphasis added).

132. On December 3, 2015, following the issuance of Sears' results for its third fiscal quarter of 2015, *Business Insider* published an article entitled "The End of Sears is 'very near'," which reported in part:

Sears has been crashing for the past decade.

The retailer, which also owns Kmart, reported a loss of \$454 million in the third quarter. The massive loss is the latest in 10 years of declining same-store sales.

Sears' comparable sales declined 9.6% in the third quarter, while Kmart's declined 7.5%.

Executives blame weak results on warmer-than-usual fall weather that kept consumers from buying items like coats and gloves. They say that the brand is investing in its "Shop Your Way" loyalty program, which offers personalized deals.

But many retail experts believe Sears is denying a darker truth: It is beyond the point of returning to its post as a major US retailer. In fact, it's in danger of not existing at all.

"Sears is like a rudderless ship, devoid of compass heading, manned by a demoralized crew and worth nothing more than the old rotten boards and nails it's made of," Doug Stephens, founder of industry website Retail Prophet and author of "The Retail Revival: Re-Imagining Business for the New Age of Consumerism," told *Business Insider*.

"If they really care about their retail business, which frankly, is debatable, nothing short of a complete and radical brand and positioning transformation will make any difference," he said. ***"Even then, I wouldn't hold out hope. The time for bold and decisive action has come and gone."***

* * *

But turnaround efforts by CEO Eddie Lampert won't make Sears a place Americans want to shop, retail expert Robin Lewis, author of industry website The Robin Report, told *Business Insider*.

Sears has spun off Lands' End to make money.

"Eddie is running out of sleight-of-hand financial tricks and asset sales to turn a quick buck and appeal to short-term, short attention-span investors," Lewis said. ***"Far more cash is bleeding out than is being generated, and that's unsustainable."***

"What I see in their future is no future," Lewis said. ***"The end is near, very near."***

Sears once dominated American retail, and didn't respond to competitors like Walmart, TJ Maxx, and JCPenney, according to the book "The New Rules of Retail," authored by Lewis and Michael Dart.

Between 1998 and 2010, the number of competitors within a 15-minute drive from any Sears grew from 1,400 to 4,300 stores, according to Lewis.

Sears could have fended off competitors by altering its strategy. Instead, the company's complacency led to a massive loss of market share.

(Emphasis added).

133. On February 9, 2016, *Fortune* reported in an article entitled "Sears Is Closing at Least 50 More Stores," that:

So where is Sears' promised transformation into a modern day retailer?

The department store company has talked a good talk in the last few years about turning itself from a traditional retailer dependent on big box stores into one that is more digitally oriented, focused on a membership model, and needing less physical space.

But at Sears Holdings, the parent company that also owns Kmart, *a continued sales slump is prompting the retailer to say it will close at least another 50 stores, following hundreds of closings in the last few years. Sears also said it is also considering selling off more assets, including its auto services business, to raise much-needed cash.*

Holiday comparable sales at Kmart fell 7.2% and 6.9% at Sears, for the worst performance among major department stores including J.C. Penney, Macy's, and Kohl's during the most important quarter for retailers.

"The holiday selling season proved to be challenging, with historically warm weather and intense competition pressuring margins and driving comparable store sales declines, particularly in our apparel and related softlines businesses," Sears said in a press release.

That's a pretty strong understatement. Trying to put some lipstick on a pig, Sears said that January was the best month of the quarter since comparable sales fell only 4.5%.

As Fortune reported last week, Sears' apparel offering has fallen so out of favor with women, the selection at thrift store Goodwill is more popular. Sears said on Tuesday that because its clothes business had really slammed its margins, it planned to overhaul that unit with new sourcing, product assortment, space allocation, pricing, and inventory management practices.

Meanwhile Sears continues to close stores. The company said it would speed up the pace of the closings in the next few months as it shuttered at least 50 more. Store fleets have shriveled: Kmart is now down to 950 locations from 1,309 just five years ago, while Sears' namesake department stores now number 708, from 868 in 2011.

Last year, to raise cash and avoid a liquidity crunch, Sears sold off many of its best store locations to a real estate investment trust, reaping \$2.7 billion. In the last few years, it has sold off assets like Sears Canada and the Lands' End apparel brand. But those assets are limited, and the company urgently needs to turn its core business around.

(Emphasis added).

134. On August 25, 2016, *USA Today* reported in an article entitled "Sears records another bleak quarter as business struggles," that:

Despite selling off surplus real estate, Sears (SHLD) sales dropped and it took a big loss in the second quarter Thursday as the company continues to try to find a way to compete against other mass marketers and online shopping.

CEO Edward Lampert again pointed to "a challenging competitive environment" in a quarter in which major indicators pointed to the trouble in which the iconic chain, which also owns Kmart, finds itself.

The company went in the red for the period ended July 30, recording a loss of \$395 million, or \$3.70 a share, compared to profit of \$208 million in the year-ago quarter, or \$1.84 a share. Adjusted for certain items, the company had a \$2.03 loss per share. That beat analyst estimates for a per share loss of \$3.48, according to S&P Global Market Intelligence.

Sales at Sears and Kmart locations open at least a year fell 5.2%, better than the 5.9% drop in the first quarter and the 10.8% drop in the second

quarter last year. Total revenue fell to \$5.7 billion from \$6.2 billion in the same quarter last year; analysts expected sales of \$5.4 billion.

The results reported Thursday didn't impress investors, who sent the company's stock down about 5.5% in afternoon trading.

* * *

Some remain skeptical Sears is doing enough to be relevant to shoppers though, and some say stores' appearance and merchandise long have failed to keep people excited. Sears store are "dull, uninspiring and somewhat depressing," Neil Saunders, CEO of retail research firm Conlumino, wrote in a note out Thursday.

He added that "Sears is a retailer that simply can not, or will not, face the realities of modern retailing and, as a result, it continues to fall out of favor with the customer."

(Emphasis added).

135. The following month, on September 14, 2016, *Business Insider* reported in an article entitled "Moody's: Sears' and Kmart's shutdown is imminent," that:

Moody's analysts say Sears and Kmart don't have enough money — or access to money — to stay in business.

In a note published Wednesday, the analysts downgraded Sears' liquidity rating, saying the company is bleeding cash and will have to continue to rely on outside funding or the sale of assets, such as real estate, to sustain operations.

"We recognize the risks associated with relying on these sources and continued shareholder support to finance its negative operating cash flow which is estimated by Moody's to be approximately \$1.5 billion this year," the analysts wrote.

Kmart in particular is at risk of shutting down, according to Moody's.

"The ratings... reflect our view on the uncertainty of the viability of the Kmart franchise in particular given its meaningful market share erosion," the analysts wrote.

Sears said in August that its cash and equivalents have fallen to \$276 million from \$1.8 billion one year ago.

As a result, the retailer was forced to accept \$300 million in financing from Sears CEO Eddie Lampert's hedge fund, ESL Investments, in the most recent quarter.

The company is losing cash as sales plunge at its namesake and Kmart stores.

Net sales fell 8.8% to \$5.7 billion in the second quarter. Same-store sales plunged 7% at Sears stores and dropped 3.3% at Kmart stores.

Sales have been falling for years.

Sears' sales dropped from \$41 billion in 2000 to \$15 billion in 2015.

Kmart, which merged with Sears in 2005, has seen its sales plunge from \$37 billion to \$10 billion in the same period.

Moody's analysts noted that Sears has a sizable asset base, but "its debts are significant with approximately \$3.5 billion of funded debt as well as an unfunded pension and post-retirement obligation of \$2.1 billion."

The company's minimum pension contributions are an immediate threat to its cash flow. In 2016 and 2017, minimum pension contributions total approximately \$596 million, analysts said.

(Emphasis added).

136. A week later, on September 21, 2016, *The Motley Fool* reported in an article entitled "The End Is Quickly Approaching for Sears Holdings Corp.," that:

The retailer's prospects for survival are diminishing as sales fall, losses widen, and costs mount.

Fears expressed by Kmart employees this summer that its new inventory management program of moving all merchandise out of the stock rooms and onto the sales floor meant parent Sears Holdings (NASDAQ:SHLD) was preparing for a liquidation seem to be coming true.

Although Kmart's president dismissed the concerns, saying the retailer was merely preparing for a "WOW experience" for customers, *Sears is now reportedly closing 64 Kmart stores within the next year, including 17 owned by real estate investment trust Seritage Growth Properties (NYSE:SRG). The closures will be in addition to the 68*

Kmart stores Sears announced it was closing in April when it also said it would be shutting 10 Sears locations. Coupled with the report chairman and CEO Eddie Lampert had to make yet another short-term loan to keep the company afloat and it's clear Sears end is coming into view.

The end is nigh

Ratings agency Moody's thinks so. It said Sears and Kmart lack the financial wherewithal to stay in business, and though it has significant assets, its debt burden is too high. Sears Holdings has some \$3.5 billion in long-term debt and its unfunded pension liability exceeds \$2 billion.

The retailer has suffered under the not-so-benign neglect of Lampert, who has ignored many of Sears problems until it was too late. While, lately, he has poured money into the company to make it a leaner operation that can compete digitally with its rivals, the vortex pulling it down is much too strong to evade.

Sears has proven unable to compete effectively against the likes of Wal-Mart or Target in the off-price wars and the impact Amazon.com had on its operations in e-commerce is even more pronounced than it is at other retailers. In its second quarter earnings report last month, Sears said net sales tumbled 9% from the year-ago period, largely because of the number of stores it was closing, but also because same store sales continued their decline, just as they have every quarter for the past 11 years. Comps were off 3.3% at Kmart and 7% at Sears.

Comparable sales are an important retail metric because they largely strip out any growth that might occur simply from opening new stores, so they are seen as a more organic measure of a business's health.

Net losses widened to \$395 million, or \$3.70 per share in the period, compared to a profit of \$208 million, or \$1.84 per share a year ago.

Neither a borrower nor a lender be

The lack of sales and mounting losses has forced Lampert to continuously lend the retailer money to keep it going and prevent suppliers from bolting and cutting off its lifeblood of goods. *In addition to the \$300 million Lampert's ESL Investments just loaned Sears, the hedge fund operator also loaned Sears \$125 million earlier this year as part of a \$500 million loan package, plus a \$750 million term loan earlier this year, which followed a \$400 million*

loan last year to make it through the holiday season. It might not be so lucky this year.

The swarm of bad news that hangs over the retailer could cause its suppliers to balk this time around and it will face increased costs due to the store closures.

In Sertiage Growth Properties filing with the SEC announcing the pending lease terminations, the REIT said Sears will continue to pay the rents on the stores until the closures occur in January, but then it will “pay Seritage a termination fee equal to one year of the aggregate annual base rent, plus estimated operating expenses.”

While the closures will let the REIT benefit from leasing the spaces again to better tenants, *it’s a sign that Sears Holdings tenure and existence is hanging by the most tenuous of threads and it’s merely a matter of time before it comes crashing down.*

(Emphasis added).

137. As alleged above, in or around September 2016, the Plan Administrator informed Participants that the Company determined to close the Sears Stock Fund to new investments, effective January 1, 2017. This decision was too little too late. By this time, the value of the Sears Stock had dropped down significantly, and the Savings Plans have already sustained tremendous losses. On January 3, 2017, the first trading day after the closure of the Sears Stock Fund to new investments, Sears Stock closed at \$9.72, down from \$35.49 at the beginning of the Relevant Period. Furthermore, the mere closure of the Sears Stock Fund to new investments did nothing to protect the Savings Plans’ existing holdings of Sears Stock.

138. On December 8, 2016, *USA Today* reported in an article entitled “‘We have fallen short’: More losses for Sears,” that:

Beleaguered retailer Sears Holdings said Thursday that it would explore options for its real estate, continue closing stores and continue cutting certain products after its third-quarter loss ballooned and revenue tumbled.

The big-box chain's gradual slide accelerated during the fiscal quarter ended Oct. 29 as the company posted a net loss of \$748 million, nearly 65% worse than the comparable period a year earlier.

Sales at its flagship Sears locations and Kmart stores open at least a year fell 7.4%. That represented a \$304 million drop in revenue, while shuttered stores represented a similar amount.

* * *

"We have fallen short on our own timetable for achieving the profitability that we believe the company is capable of generating," CFO Jason Hollar said in a conference call.

One potentially concerning sign is increased borrowing. Long-term debt mushroomed from \$2.2 billion on Jan. 30 to \$3.7 billion on Oct. 29.

Hollar said the company would continue to add debt but that it will fund the company's transformation through its Shop Your Way loyalty program and won't fund operating losses.

"We cannot guarantee when we will return to profitability, but it is our intention to do so as soon as possible," he said.

(Emphasis added).

139. Despite these dire news concerning the Company's mounting debt and contracting operations, the Defendant-fiduciaries continued to maintain the Sears Stock Fund as an investment option in the Savings Plans, in contravention of their duty continually to monitor plan investments and remove imprudent ones.

140. The Company has continued on its downward path in 2017. In the beginning of the year, on February 7, 2017, *The Motley Fool* reported in an article entitled "Why Sears Holdings Corp. Fell 25% in January," the following with regard to further losses in the value of Sears Stock and the downgrades by the ratings agencies:

What happened

Shares of Sears Holdings (NASDAQ: SHLD) fell 24.9% in January 2017, according to data Opens a New Window. from S&P Global Market Intelligence.

So what

The storied retailer is running out of shareholder confidence. January started with Sears taking out loans from a hedge fund managed by Eddie Lampert, the company's own chairman and CEO. Other lenders seem unwilling to bet on Sears actually paying off new debts.

Then, the company announced the sale of its Craftsman tool brand to Stanley Black & Decker (NYSE: SWK), bringing in \$900 million of much-needed cash. *Even so, these financing moves failed to impress the credit bureaus, and Sears' credit rating took a hit in late January. In fact, Fitch Ratings has lowered Sear's unsecured credit rating to CC -- a "highly vulnerable" state, just a click or two away from bankruptcy.*

Now what

Sears has been burning cash in each of the last five years, while annual sales tumbled 43% lower and shareholders have lost 92% of their early 2012 holdings. The company failed to compete against e-commerce specialists, and management is now too busy selling the furniture to attempt any positive changes to the collapsing business model.

Investors should stay far away from this imploding ticker. There is no soaring turnaround on the horizon, no last blue light special, and no reason to bet on a bounce.

(Emphasis added).

141. In just a little over a month, Sears announced in its March 21, 2017 Form 10-K, that its "historical operating results indicate substantial doubt exists related to the company's ability to continue as a going concern."

142. On the same day, March 21, 2017, *Fortune* reported in an article entitled "Sears Acknowledges 'Substantial' Fears It Could Go Bankrupt" that:

Sears Holdings has recognized for the first time that many people think the retailer is not long for this world.

In its annual report released on Tuesday, the retailer, which owns Sears and Kmart, said that its years-long sales declines, “indicate substantial doubt exists related to the Company’s ability to continue as a going concern.” In other words, many think Sears will go under.

Sears Holdings sales have been imploding for years now, and the company has now lost a total of almost \$10 billion in the last six years. Comparable sales at Kmart fell 7.4% last year, while at Sears they were down 9.3%, much bigger drops than at almost all other major retailers.

The retailer has in recent years sold off many assets, from Lands’ End to its Craftsman tool brand to some of its best stores, staving off liquidity crunches. Sears Holdings has also borrowed money from its chief executive, hedge fund manager Eddie Lampert, and refinanced much of its debt. Last month, it announced moves to cut costs by \$1 billion. Sears has also cut its debt and pension obligations by at least \$1.5 billion this year. And it is closing another 150 stores.

* * *

...Lampert has been promising investors and employees a turnaround for years, saying Sears would become a leaner retailer focused on members. Yet comparable sales have kept declining and losses mounted, with no relief in sight. ...

(Emphasis added).

143. The next day, on March 22, 2017, *Reuters* reported in an article entitled “Sears shares sink as investors fret over going-concern risk,” that:

(Reuters) - Sears Holdings Corp’s (SHLD.O) shares tumbled as much as 16 percent on Wednesday as bondholders and investors questioned how long the storied retailer could remain in business after it flagged doubts that it could continue as a going concern.

For several years, the parent of Sears, Roebuck and Co and Kmart has taken on big losses, closed stores and divested businesses as it faced stiff competition. A changing retail landscape in which many brick-and-mortar retailers have gone bust and e-commerce has boomed has also plagued the retailer.

The warning on Tuesday added a new element of uncertainty for a company that has \$13.19 billion in liabilities and said it could have difficulty obtaining merchandise from vendors. Bondholders are watching to see whether Sears will have the cash and credit needed to stock its shelves for the crucial 2017 holiday season.

Sears Chief Financial Officer Jason Hollar wrote in a blog post on Wednesday that the company had boosted its liquidity by up to \$1 billion through loan agreements and amended an existing credit facility to provide an additional \$250 million, among other steps to improve performance and finances.

“As 2016 proved to be another challenging year for most ‘bricks and mortar’ retailers, our disclosures reflected these developments,” Hollar wrote. “While historical performance drives the disclosure, our financial plans and forecast do not reflect the continuation of that performance.”

Many question the company’s chances for survival, however. Sears last turned an annual profit in 2011.

“The retail industry is just too competitive, the brand value of Sears has diminished dramatically, the seismic shifts in consumer spending both in terms of the move to e-commerce and to experiences don’t bode well for Sears,” said Ken Perkins, president of industry research firm Retail Metrics. “We have seen a spate of Chapter 11 filings in recent months, and it is difficult to see how Sears avoids the same fate.”

Shares of Sears were down 11.9 percent at \$8.02 in late afternoon after falling to \$7.60, their largest one-day percentage decline since an 18.79 percent drop on Nov. 16, 2012.

The Fate of an American Retail Icon

Sears, Roebuck and Co - and its famed catalog - was once an American retailing icon. The company traces its origins to 1886, when Minnesota railroad station agent Richard Sears bought an unwanted shipment of watches, then sold them “at a nice profit,” according to the company’s website.

The company was also a mail-order pioneer, selling a wide variety of goods to farmers and others in far-flung rural areas. By 1895, its 532-page catalog’s offerings included a treasure trove of offerings.

It was not until 1925 that Sears opened its first retail store - and that was an experiment, according to the website.

But keeping up with the times has been costly as nimbler competitors, internet shopping and empty malls have taken a toll and the company has had to restructure. Some analysts and industry experts wonder if the efforts can pull it out of its current situation.

“They would need to make so many cost cuts, the business wouldn't exist anymore,” said Neil Saunders, managing director of retail at research firm GlobalData. ***“They can’t make all of those cuts because they have lease obligations and contractual obligations. The business is fundamentally broken. Its liabilities outweigh its assets.”***

“The only way it could survive is enter bankruptcy protection and have a fundamental restructuring, which would be extremely painful,” he added. ***“There’s no other option.”***

The company has been controlled by its billionaire chief executive, Edward Lampert, who has cut U.S. stores by nearly a third, reduced holdings in Sears Canada and spun off the Lands’ End clothing chain. The company has also placed some of its stores into a real estate investment trust, sold its Craftsman line of tools and repeatedly raised debt from Lampert’s hedge fund.

“This revelation in their annual report that they may not be able to continue as a going concern is really just another step towards what is inevitably going to be a financial collapse,” said Mark Cohen, former CEO of Sears Canada and director of retail studies at Columbia Business School.

Blow to Lambert

The news is a blow to Lampert, who took command of Sears after merging it with Kmart, which he controlled, in 2004.

Lampert owned nearly 10 percent of the REIT that paid Sears \$2.6 billion in 2015 for the stores it purchased, many of which were then leased back to the retailer.

The company had said that actions taken to boost liquidity, including the Craftsman sale to power tool maker Stanley Black & Decker Inc. (SWK.N), could satisfy its capital needs for the current fiscal year.

But in a filing on Tuesday it also makes clear that additional asset sales could prove problematic.

As part of the Craftsman sale, Sears Holdings reached an agreement with the Pension Benefit Guarantee Corp that puts a claim on some assets to protect pensions of retired employees.

The agreement “contains certain limitations on our ability to sell assets,” the company said.

Already, the pension board agreement requires Sears to make a \$250 million cash payment to its pension plan by March 2020, and the pension board has a 15-year lien on revenue owed to Sears from future sales of Craftsman products.

As the 2017 holiday season nears, Sears will need cash. Retailers typically book orders for merchandise for the vital fourth quarter from now through midsummer.

The company said continued operating losses could restrict access to new funds under its domestic credit agreement.

Since 2012, Sears’ annual revenue has fallen 47 percent to \$22.1 billion, and the company has posted \$10.54 billion in losses, including \$2.22 billion in the year ended Jan. 28.

The company has \$286 million in cash on hand, down from \$609 million in 2012. At the same time, receivables, which retailers in distress often use to fund operations, fell to \$466 million from \$635 million.

Saunders said Sears would probably have a hard time meeting its obligations as the year progresses.

“It’s going to add more debt, use more of its debt facility,” he said. “It’s going to be in a very, very difficult position, unless they find some other asset they can quickly liquidate and sell to keep the business going.”

(Emphasis added).

144. On June 22, 2017, *Business Insider* reported in an article entitled “Sears is closing 20 more stores – here’s the full list,” that:

Sears Holdings is closing 20 more stores in the US, in addition to the 245 closings that had already been announced this year.

* * *

Sears announced its first round of store closures in January. Three more rounds have been announced since then.

The latest closures were announced to employees on the same day that Sears Canada, which was spun off from Sears Holdings in 2012, revealed that it would be closing a quarter of its stores — 59 locations total — as part of a court-supervised restructuring. ...

(Emphasis added).

145. A few weeks following the news of Sears Canada's bankruptcy, on July 20, 2017, Sears announced that it had agreed to sell Kenmore appliances on Amazon.com. While the announcement of the deal was followed by a short-lived uptick in the price of Sears Stock, the deal was widely criticized in the financial press as insufficient to right the sinking ship that Sears had become. The next day following the deal announcement, on July 21, 2017, *InvestorPlace* reported in an article entitled "Sears Holdings Corp (SHLD) Stock Is Going to Zero No Matter What," that:

SHLD selling appliances on Amazon won't be enough to stave off bankruptcy

The retail industry is in a difficult transition period in which consumers are turning more toward e-commerce and away from traditional brick-and-mortar stores. While the majority of the old-school U.S. retailers are working to cope with the new trend, one store has been so badly beaten down that there appears to be no way to salvage the business.

Sears Holdings Corp (NASDAQ:SHLD) is on its last legs despite CEO Eddie Lampert's best efforts to keep the company afloat.

Even though Lampert's rhetoric suggests that he still believes there is some potential there, the survival of SHLD stock looks very unlikely. It got a pop this week on news it would be selling appliances on Amazon.com, Inc. (NASDAQ:AMZN), but that won't be enough. In fact, I'd be surprised to see Sears stock stay afloat for longer than a year.

Lampert's Delusions About Sears

It's difficult to figure out what exactly is going on in Sears CEO Eddie Lampert's mind. On one hand, it should be encouraging for traders to see a CEO stand so firmly behind his company.

However, much of his confidence appears to be unfounded, and when you dig a little bit deeper, his financial tie-ups with SHLD make it look like an impending bankruptcy would actually be in his best interest.

Eddie Lampert is in an unusual position in that he is one of SHLD's largest secured creditors. Together with his hedgefund, Lampert owns almost half of Sears' secured debt. The issue with this is that Lampert will be one of the first in line to collect should the company go under, something that should make shareholders wary.

Not only that, but Lampert also bought up a great deal of SHLD stock's real estate in order to create a real estate investment trust called Seritage Growth Properties (NYSE:SRG). U.S. bankruptcy law says that such a purchase could be considered a conflict of interest if Sears were to file for bankruptcy within two years.

Since that purchase happened over two years ago, Lampert is in a pretty good position if the company does decide to pack up shop.

Smaller Format, Smaller Footprint for SHLD Stock

If you aren't suspicious of Lampert's business dealings when it comes to a Sears bankruptcy, then you might be encouraged by the Amazon deal. Alternately, you may be looking at the firm's recent decision to downsize and sell off some of its less-profitable stores as a positive.

While it's true that the closures will bring in a bit of much-needed cash and help reduce operating costs, those benefits are unlikely to do more than drag out the company's inevitable demise a little bit longer. ***Without a catalyst for future growth, SHLD stock is doomed no matter what.***

Lambert has been pointing to SHLD's latest "small format" store initiative as a lifeline for the future, but I'd say that's an overly optimistic viewpoint. ***It's really too late for SHLD to turn things around. Small-format stores that focus on more profitable categories would have been a good idea a few years ago when the***

firm started to slip into the danger zone, but at this point it appears to be a case of too little too late.

Surviving Against the Odds

Sears has been limping forward over the past year despite the fact *that most investors agree that bankruptcy is an inevitable outcome. I believe that a big part of Sears' forward momentum has been due to Lampert's real estate transaction, and with that issue now out of the way, a Chapter 11 filing looks more likely.*

SHLD's most recent store closures will probably keep the company afloat through the rest of the year, but not much longer. There's only so much Lampert can do to keep the company ticking forward without turning a profit.

A bankruptcy is coming. It's impossible to be certain about exactly when the filing will come, but I don't think it's unreasonable to expect it sometime in the next 12 months. Investors should steer clear of SHLD stock, unless they want to get burned.

(Emphasis added).

146. Other financial publications agreed that Sears' deal with Amazon is not enough to stave off the Company's demise. On July 22, 2017, for instance, *Forbes* reported in an article entitled "With Kenmore Deal Amazon Is A Winner. For Sears, Not So Much," by Sears' former Vice President of Strategy, Steve Dennis, that:

Investors reacted quite favorably to the news that Kenmore appliances will soon be sold through Amazon. For Amazon, it's clearly an interesting opportunity. While online sales of major appliances are currently comparatively small, being able to offer a leading brand on a semi-exclusive basis gives Amazon a jump start in a large category where they have virtually no presence. *On the other hand, for Sears, it smacks of desperation.*

First, some context. Way back in 2003 I was Sears' VP of Strategy and my team was exploring options for our major private brands. *Despite years of dominance in appliances and tools, our position was eroding. Our analysis clearly showed that not only would we continue to lose share (and profitability) to Home Depot, Lowe's and Best Buy, but those declines would accelerate without dramatic action. Unfortunately, it was also clear that very little*

could be done within our mostly mall-based stores to respond to shifting consumer preferences and the growing store footprints of our competitors. Kenmore, Craftsman and Diehard's deteriorating positions were fundamentally distribution problems. And to make a long story a bit shorter, a number of recommendations were made, none of which were implemented in any significant way.

Flash forward to today, and Sears leadership in appliances and tools is gone. While in the interim some minor distribution expansion occurred, it was not material enough to offset traffic declines in Sears stores and the shuttering of hundreds of locations. More important is the fact that Kenmore and Craftsman still aren't sold in the channels where consumers prefer to shop--and that train has left the station.

So last week's announcement does expand distribution, but it does little, if anything, to fundamentally alter the course that Sears is on. Simply stated, making Kenmore available on Amazon will not generate enough volume to offset continuing sales declines in core Sears outlets, particularly as more store closings are surely on the horizon. Selling Kenmore on Amazon does not in any way make Sears a more relevant brand for US consumers. In fact, it will give many folks one more reason not to traffic a Sears store or sears.com.

Since 2013 I have referred to Sears as "the world's slowest liquidation sale", owing to Eddie Lampert's failure to execute anything that looks remotely like a going-concern turnaround strategy, while he does yeoman's work jettisoning valuable assets to offset massive operating losses. Earlier this year, Sears fetched \$900 million by selling the Craftsman brand to Stanley Black & Decker, one of the leading manufacturers and marketers of hand and power tools. So it's hard to imagine that Sears did not try to do a similar deal with either a manufacturer of appliances (e.g. Whirlpool or GE) or one of the now leading appliance retailers. *The Kenmore partnership with Amazon appears to have far less value than the Craftsman deal, despite being done just six months later--which speaks volumes to how far Sears has fallen and for how weak Sears' bargaining position has become.*

The cash flow from the Amazon transaction will do little to mitigate Sears operating losses and downward trajectory. In fact, it seems to be mostly the best way, under desperate circumstances, to extract the remaining value of the Kenmore brand given that no high dollar suitors emerged and Sears continues its march toward oblivion. Amazon, however, is able to take advantage of fire-sale

pricing and create the valuable option to have Kenmore as a potentially powerful future private brand to build its presence in the home category.

Advantage Bezos.

(Emphasis added).

147. Additionally, on July 30, 2017, *The Street* reported in an article entitled “50 Reasons Dying Sears Had No Choice But to Strike a Deal With the Ruthless Amazon,” that:

Let’s not dance around it, Sears Holdings Corp. (SHLD) is an utter disaster despite its new appliance deal with Amazon (AMZN).

The company’s CEO and chairman, Eddie Lampert, announced in a blog post recently that the company is shuttering more locations. It is closing eight Sears and 35 Kmart stores that were unprofitable in early October, according to the announcement.

* * *

In 2016 alone, Sears wiped out \$1.6 billion of its own cash and, according to financial analyst Brian Sheehy of Iszo Capital, the retailer is currently burning through \$189 million in cash a month. Per Sheehy’s calculations, Sears could run out of cash shortly.

* * *

Over the past 10 years, Sears’ shares have tanked nearly 95% from a high of \$147.31 on April 17, 2007. It is down more than 4% in 2017 alone.

That’s a ton of red ink for investors. What’s left of them...

(Emphasis added).

148. The next day, on July 31, 2017, *The Street* reported in an article entitled “Sears Is Being Pummeled by Amazon and Walmart in This Key Business It Once Dominated,” the following:

It’s time to let go, Sears. Really.

The drip, drip, drip of Sears Holdings Corp.'s (SHLD) demise keeps splattering all over the place.

Although they “missed the mark on pricing,” Amazon.com Inc. (AMZN) and Walmart Stores Inc.’s (WMT) Jet.com expanded their appliance offerings over the July 4 holiday, BMO Capital Markets wrote in a note published on Wednesday, July 19.

* * *

Even with Amazon and Jet seemingly scaling back on promotions, ***the fact that they are expanding their appliance offerings at all could prove damaging to Sears***, which is still heavily dependent on its appliance sales and installation services—another area Amazon reportedly is trying to make headway.

When customers buy appliances on Amazon.com, they are now being “prompted to purchase installation services,” according to BMO.

In an earlier research note, BMO said Sears’ appliance offering dropped to 1,600 products in June from 2,002 in January.

* * *

On July 7, Sears CEO and Chairman Eddie Lampert announced in a blog post that the retailer would be closing an additional eight Sears and 35 Kmart stores in October, on top of the 265 locations it already planned to shutter this year. ...

(Emphasis added).

149. Accordingly, during the Relevant Period, Sears Stock Fund was not a prudent investment option for the Participants, in light of, *inter alia*, (a) poor historical performance of Sears Stock; (b) the Company’s unsustainable business model; (c) the Company’s inability to compete with its peers; (d) the massive amounts of debt threatening the Company’s survival; (e) the Company’s rising debt-to-equity ratio; (f) the Company’s high debt management risk; (g) the Company’s continuing losses as noted in Sears’ quarterly reports; and (h) the Company’s likelihood of bankruptcy.

IX. DEFENDANTS HAD A CONTINUING DUTY TO MONITOR THE SUITABILITY OF SEARS STOCK IN THE SAVINGS PLANS BUT FAILED TO DO SO AND IGNORED THE PUBLIC RED FLAGS REGARDING THE PERFORMANCE OF THE SEARS STOCK FUND

150. Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset. In the context of an ESOP investment, such as here, the issue is not whether the Sears Stock Fund was properly diversified, but whether the Savings Plans should have been permitted to invest in Sears Stock at all during the Relevant Period, in light of the publicly available information pointing to the contrary. As recently observed by one court that permitted an imprudence claim to proceed in an analogous breach of fiduciary duty action under ERISA, "[plaintiffs] allege that Kodak stock was on a long, steady, virtually unstoppable downhill slide, and that no prescience or inside knowledge was needed to realize that it would continue to do so." *Gedek v. Perez*, 66 F.Supp.3d 368, 379 (W.D.N.Y. 2014). Here, likewise, among other things alleged herein, the Company's stock price has been in a years-long decline, and the Sears Stock Fund has been unable to as much as meet its stated investment benchmark for a number of years, rendering this fund an imprudent investment option for the Savings Plans during the Relevant Period. Yet, the Administrative Committee and the Investment Committee Defendants failed to monitor the Sears Stock Fund, and timely close this fund to new investments, and/or remove it altogether from the lineup of investment options offered to Participants.

151. Notably, the severe decline of the price of Sears Stock and the devastating losses resulting therefrom to the Savings Plans' holdings of that stock, did not come as an eleventh-hour surprise to the Defendant-fiduciaries. As alleged herein, the unraveling of the Company took place over a number of years, beginning well before the Relevant Period.

152. The losses to the Sears Stock Fund were ongoing, massive, and severe during the Defendants' purported stewardship of the Savings Plans (both before and during the Relevant Period). Not only did the Defendant-fiduciaries have access to publicly available information that the entire retail industry had been struggling for a number of years, but they were also on years-long notice of numerous public red flags *that Sears in particular* had been faring significantly worse than the retail industry as a whole.

153. For example, according to the "Investment-Related Information," provided to Participants through the Sears Holdings Plan – Annual Fee Disclosure Statement, updated October 1, 2016 ("October 2016 Fee Disclosure Statement"), Sears Stock Fund has continuously lagged behind its stated performance benchmark, the S&P 500 Retailing Index, as follows¹⁰:

Table 1—Variable Return Investments ¹								
Name/ Type of Option	Annualized Investment Returns as of 12/31/15				Benchmark			
	1 yr.	5 yr.	10 yr.	Since Inception	1 yr.	5 yr.	10 yr.	Since Inception
Company Stock								
Sears Holdings Corporation Stock	-31.2%	-14.2%	-11.5%	0.4%	25.6%	21.8%	12.3%	12.0%
					Benchmark: S&P 500 Retailing Index			

154. Upon information and belief, the adverse data concerning the performance of the Sears Stock Fund contained in both the October 2016 and the December 2016 Fee Disclosure Statements has been available to the Defendant-fiduciaries, responsible for monitoring the Sears Stock Fund during the Relevant Period.

155. Additionally, as alleged herein, Defendants were aware that during the Relevant Period, among other things, the Company continued to experience operating losses and problems generating liquidity and managing its debt.

¹⁰ The same data regarding the performance of the Sears Stock Fund vis-à-vis its stated benchmark, the S&P 500 Retailing Index, was furnished to Participants via the Sears Holdings Plan – Annual Fee Disclosure Statement, updated December 8, 2016 ("December 2016 Fee Disclosure Statement") at 5.

156. Accordingly, the Defendant-fiduciaries were on notice through the plethora of widely publicized information alleged herein that the Sears Stock Fund performed extremely poorly both before and throughout the Relevant Period, and, as such, was an imprudent option for retirement savings.

157. Based on the publicly available information discussed above, the Administrative Committee and the Investment Committee Defendants had available to them numerous options for actions they could have undertaken in an effort to satisfy their fiduciary duties with respect to the Savings Plans. For example, in order to protect the Savings Plans, Defendants could have (1) stopped purchasing additional shares, or allowing Participants to purchase additional shares of Sears Stock well before the closure of the Sears Stock Fund to new investments in January 1, 2017; and (2) divested the Savings Plans of their Sears Stock holdings after disclosing their reasons for doing so.

158. Such actions would have prevented millions of dollars of losses to the Savings Plans, and would not have run afoul of the federal securities laws prohibiting trading on insider information because these actions would have been based on public information.

159. The Administrative Committee and the Investment Committee Defendants' decisions respecting the Savings Plans' investment in Sears Stock, under the circumstances alleged herein, constituted a breach of fiduciary duty because a prudent fiduciary acting under similar circumstances would have acted to protect Participants from the ongoing massive losses stemming from the Savings Plans' investment in the Sears Stock, and the high risk of further substantial losses that further investments in Sears Stock posed to the Savings Plans during the Relevant Period.

160. The Administrative Committee and the Investment Committee Defendants breached their duties to prudently and loyally manage the Savings Plans' assets by allowing the Savings Plans to continue to hold shares of Sears Stock and to continue to purchase additional shares as this asset became excessively risky in light of the crisis facing Sears. During the Relevant Period, as discussed *supra*, these Defendants knew or should have known that Sears Stock was not a suitable investment for the Savings Plans. Investment in Sears Stock during the Relevant Period clearly did not serve the Savings Plans' purpose of encouraging savings, and in fact caused enormous monetary losses to the Savings Plans and wiped out Participants' retirement savings. During the Relevant Period, despite their knowledge of the imprudence of the investment, the Administrative Committee and the Investment Committee Defendants failed to take any meaningful steps to protect the Participants from the inevitable losses that they knew would likely occur because Sears Stock had become far too risky as an appropriate vehicle for retirement savings.

161. The price of Sears Stock collapsed by over 76% during the Relevant Period. The Savings Plans' losses would have been avoided, in whole or in part, had Defendants complied with their ERISA fiduciary duties, including, but not limited to (a) investigating, evaluating, and deciding whether Sears Stock was a prudent retirement investment in light of Sears' severe liquidity problems from the start of the Relevant Period; (b) timely ceasing new purchases of Sears Stock for the Savings Plans, instead of waiting until January 1, 2017 to do so; (c) timely discontinuing Sears Stock Fund as an investment option for the Savings Plans; and (d) allowing for the orderly liquidation of the Savings Plans' holdings of Sears Stock.

162. The Savings Plans suffered millions of dollars in losses both before and during the Relevant Period because Defendants caused substantial assets of the Savings Plans to be

imprudently invested, or allowed Participants to remain invested in Sears Stock, in breach of Defendants' fiduciary duties. These losses were reflected in the Participants' diminished account balances.

163. Defendants failed to actively monitor and assess whether an investment of retirement savings in Sears Stock was prudent, in light of the deteriorating financial condition of the Company and severe liquidity problems which presented a material risk of complete loss to the Sears Stock Fund. As a consequence of Defendants' actions, regardless of any ability to divest, Participants did not exercise independent control over their investments in the Sears Stock Fund, and Defendants are liable under ERISA for losses to the Savings Plans caused by the investment in the Sears Stock Fund when it was imprudent to make such investments.

X. PROTECTIVE ACTIONS DEFENDANTS COULD HAVE TAKEN REGARDING THE SAVINGS PLANS' ASSETS INVESTED IN SEARS STOCK DURING THE RELEVANT PERIOD

164. The Relevant Period begins on May 22, 2014 because at least by then, Defendants should have been aware that investment in Sears Stock was no longer prudent for the Plan.

165. Rather than waiting until January 1, 2017, when Sears Stock already lost tremendous value to close the Sears Stock Fund to new investments, Defendants could have taken numerous steps with regard to the Savings Plans' assets invested in Sears Stock to fulfill their fiduciary duties to the Savings Plan under ERISA. As alleged herein, none of these actions would have implicated, let alone been in violation of, the federal securities laws or any other laws.

166. Defendants should have investigated and monitored the performance of the Sears Stock Fund, and assessed the appropriateness of the Savings Plans' investment in that fund in light of Sears' continuously deteriorating business prospects and liquidity constraints.

167. Defendants further should have timely closed the Sears Stock Fund to new investments *prior* to the start of the Relevant Period, after making the proper disclosure of such

closure, instead of waiting until January 1, 2017 to do so, by which time, the Savings Plans had already sustained massive losses, resulting from their investments in the Sears Stock.

168. Notably, in or around January 2017 (when the Sears Stock Fund was being closed to new investments), Participants were advised that as of March 1, 2017, six (6) new Target Retirement Funds will be added as investment options for the Sears Plan (in addition to the existing investment options). Plan Administrator Notice Re Savings Plan Changes, dated January 2017. The belated addition of these Target Retirement Funds, following the closure of the Sears Stock Fund to new investments, shows that such action, among others, could have been effectuated sooner, to prevent the devastating losses to the Savings Plans that resulted from Defendants' imprudent conduct during the Relevant Period.

169. To discharge their fiduciary duties under the Savings Plans, Defendants also could have undertaken an orderly divestment of the Sears Stock Fund held by the Savings Plans, and assisted Participants with redirecting the proceeds into other investment options available to Participants during the Relevant Period¹¹.

170. Further, Defendants also could have: (a) sought guidance from the DOL or SEC as to what they should have done; and (b) resigned as fiduciaries of the Savings Plans to the extent they could not act loyally and prudently; and/or (c) retained outside experts to serve either as advisors or as independent fiduciaries specifically for the Sears Stock Fund.

¹¹ By way of example, such action (namely liquidating and removing a company stock fund) was recently undertaken by Aon plc ("Aon"). According to [Aon's Form 11-K filed on June 29, 2017](#), effective April 1, 2017 the Aon Stock Fund was discontinued as an active investment option in the AON Savings Plan. In particular, after March 31, 2017 participants were not able to contribute or transfer any savings into the Aon Stock Fund (including employee contributions, Aon matching contributions, fund transfers-in, loan repayments, and rollover contributions). On December 1, 2017, the Aon Stock Fund will be liquidated and removed from the plan.

XI. THE RELEVANT LAW: CLAIMS FOR RELIEF UNDER ERISA

171. ERISA requires that every plan name one or more fiduciaries who have “authority to control and manage the operation and administration of the plan.” ERISA § 1102(a)(1). Additionally, under ERISA, any person or entity, other than the named fiduciary, that in fact performs fiduciary functions for the Savings Plans is also considered a fiduciary. A person or entity is considered a plan fiduciary to the extent:

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises *any* authority or control respecting management or disposition of its assets, ... or
- (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (emphasis added).

172. At all relevant times, Defendants are/were and acted as fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

173. Further, according to the Sears Plan Document:

Fiduciary Duties. Each Fiduciary shall perform its duties under the Plan and the Trust Agreement:

- (a) Solely in the interest of Participants and Beneficiaries;
- (b) For the exclusive purpose of providing benefits to Participants and Beneficiaries and defraying reasonable expenses of the Plan; and
- (c) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

Id., Article 13.2.

174. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

175. ERISA § 409(a), 29 U.S.C. § 1109(a), “Liability for Breach of Fiduciary Duty,” provides, in pertinent part, that:

any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

176. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), provide, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

177. These fiduciary duties under ERISA § 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence and are the highest known to the law and entail, among other things:

- the duty to conduct an independent and thorough investigation into, and continually to monitor, the merits of all the investment alternatives of a plan;
- the duty to avoid conflicts of interest and to resolve them promptly when they occur.

A fiduciary must always administer a plan with an “eye single” to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor;

- the duty to disclose and inform, which encompasses: (1) a negative duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should

know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

178. Accordingly, if the fiduciaries of a plan know, or if an adequate investigation would reveal, that an investment option is no longer a prudent investment for that plan, then the fiduciaries must disregard any plan direction to maintain investments in such stock and protect the plan by investing the plan assets in other, suitable, prudent investments.

179. ERISA § 405(a), 29 U.S.C. § 1105 (a), “Liability for breach by co-fiduciary,” provides, in pertinent part, that:

[I]n addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (A) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (B) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (C) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

180. Plaintiff therefore brings this action under the authority of ERISA § 502(a) for plan-wide relief under ERISA § 409(a) to recover losses sustained by the Savings Plans arising out of the breaches of fiduciary duties by Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

XII. REMEDIES FOR BREACHES OF FIDUCIARY DUTY

181. As noted above, as a consequence of Defendants’ breaches, the Savings Plans suffered significant losses.

182. ERISA § 502(a), 29 U.S.C. § 1132(a) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires “any

person who is a fiduciary . . . who breaches any of the . . . duties imposed upon fiduciaries . . . to make good to such plan any losses to the plan....” Section 409 also authorizes “such other equitable or remedial relief as the court may deem appropriate....”

183. Plaintiff, the Savings Plans, and the Participants are therefore entitled to relief from Defendants in the form of: (1) a monetary payment to the Savings Plans to make good to the Savings Plans the losses to the Savings Plans resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a)(2) and (3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (3); (3) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (4) taxable costs; (5) interests on these amounts, as provided by law; and (6) such other legal or equitable relief as may be just and proper.

184. Under ERISA, each Defendant is jointly and severally liable for the losses suffered by the Savings Plans in this case.

COUNT I

FAILURE TO MONITOR THE SEARS STOCK FUND AND PRUDENTLY MANAGE THE SAVINGS PLANS’ ASSETS INVESTED IN THE SEARS STOCK FUND (BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA §§ 404(a)(1)(B) BY THE ADMINISTRATIVE COMMITTEE AND THE INVESTMENT COMMITTEE DEFENDANTS)

185. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

186. This Count alleges fiduciary breaches against the Administrative Committee and the Investment Committee Defendants (the “Prudence Defendants”) for failing to do a proper

investigation into the continued prudence of investing the assets of the Savings Plans in Sears Stock and for continuing to allow the investment of the Savings Plans' assets in Sears Stock throughout the Relevant Period, despite the fact that they knew or should have known that such investment was imprudent as a retirement vehicle because the Sears Stock Fund performed extremely poorly throughout the Relevant Period, and no longer served to meet the Savings' Plans stated objective of helping Participants accumulate money for retirement.

187. At all relevant times, as alleged above, the Prudence Defendants were named fiduciaries of the Savings Plans. Additionally, the Prudence Defendants were fiduciaries of the Savings Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) in that they (1) have exercised discretionary authority or discretionary control respecting the management of the Savings Plans, and/or (2) have exercised any authority or control respecting the management or disposition of the assets of the Savings Plans, and/or (3) have had discretionary authority or discretionary responsibility in the administration of the Savings Plans.

188. Under ERISA, fiduciaries who exercise discretionary authority or control over management of a plan, or who exercise *any* authority or control over the management or disposition of a plan's assets are responsible for ensuring that all investment options made available to participants under a plan are prudent. Furthermore, such fiduciaries are responsible for ensuring that assets within the plan are prudently invested. The Prudence Defendants were responsible for ensuring that all investments in the Savings Plans were prudent, including the Plans' investment in the Sears Stock Fund. The Prudence Defendants are liable for losses incurred as a result of such investment being imprudent.

189. Upon information and belief, Defendants failed to engage in a reasoned decision-making process regarding the prudence of Sears Stock. An adequate investigation by Defendants

would have revealed to the Prudence Defendants that investment by the Savings Plans in Sears Stock was clearly imprudent during the Relevant Period. A prudent fiduciary acting under similar circumstances would have acted to protect Participants against unnecessary losses, and would have made different investment decisions.

190. The Prudence Defendants breached their duties to monitor and prudently manage the assets of the Savings Plans invested in Sears Stock. During the Relevant Period, the Prudence Defendants knew or should have known that, as described herein, Sears Stock was not a suitable and appropriate investment for the Savings Plans. Yet, during the Relevant Period, despite their knowledge of the imprudence of the investment, the Prudence Defendants failed to take any meaningful steps to protect Participants from losses stemming from the Savings Plans' investment in Sears Stock.

191. The Prudence Defendants further breached their duty of prudence by failing to divest the Savings Plans of Sears Stock during the Relevant Period, and/or by ceasing additional purchases of Sears Stock well before January 1, 2017, when they knew or should have known that Sears Stock was not a suitable and appropriate investment for the Savings Plans.

192. As a direct and proximate result of the breaches of fiduciary duties during the Relevant Period alleged herein, the Savings Plans and, indirectly, the Participants lost a significant portion of their retirement investments. Had the Prudence Defendants taken appropriate steps to comply with their fiduciary obligations during the Relevant Period, the Savings Plans could have liquidated some or all of their holdings in Sears Stock, and/or not have purchased additional imprudent Sears Stock, and thereby eliminated, or at least reduced, the losses to Participants.

193. Pursuant to ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3) and ERISA § 409, 29 U.S.C. § 1109(a), Defendants in this Count are liable to restore the losses to the

Savings Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT II

BREACH OF DUTY OF LOYALTY AND EXCLUSIVE PURPOSE (BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA §§ 404(a)(1)(A) BY DEFENDANT LAMPERT, THE ADMINISTRATIVE COMMITTEE AND THE INVESTMENT COMMITTEE DEFENDANTS)

194. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

195. This Count alleges fiduciary breaches against Defendant Lampert, the Administrative Committee and the Investment Committee Defendants (the “Loyalty Defendants”) for, *inter alia*, their self-serving decision to continue to allow the investment of the assets of the Savings Plans in Sears Stock throughout the Relevant Period despite the fact that they knew or should have known that such investment was imprudent as a retirement vehicle because the Sears Stock Fund had performed very poorly throughout the Relevant Period and that the Company’s basic risk profile had been so dramatically altered due to changed circumstances that it was no longer a prudent retirement investment.

196. As alleged above, the Administrative Committee and the Investment Committee Defendants were named fiduciaries of the Savings Plans. At all relevant times, as alleged above, the Loyalty Defendants were also fiduciaries of the Savings Plans within meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Consequently, they were bound by the duties of loyalty, exclusive purpose and prudence.

197. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), imposes on plan fiduciaries a duty of loyalty; that is, a duty to discharge their duties with respect to a plan solely in the interest

of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries.

198. During the Relevant Period, the Loyalty Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, *inter alia*: failing to timely engage independent fiduciaries who could make independent judgments concerning the Savings Plans' investments in Sears Stock; and by otherwise placing their own and/or the Company's interests above the interests of the Participants with respect to the Savings Plans' investment in the Company's securities.

199. Further, the Loyalty Defendants, as the fiduciaries of the Savings Plans, knew or should have known certain basic facts about the characteristics and behavior of the Participants, well-recognized in the 401(k) literature and the trade press¹² concerning employees' natural bias toward investing in company stock, including that:

- Out of loyalty, employees tend to invest in company stock;

¹² See, e.g., David Blanchett, CFA, CFP, Morningstar Investment Management, "Employer Stock Ownership in 401(k) Plans and Subsequent Company Stock Performance," July 1, 2013 at 7; David K. Randall, *Danger in Your 401(k)*, Forbes.com (August 30, 2010), available at: www.forbes.com/forbes/2010/0830/health-retirement-savings-erisa-danger-in-401k_print.html); Liz Pulliam Weston, *7 Ways to Mess Up Your 401(k)*, MSN.com (December 31, 2007), available at: articles.moneycentral.msn.com/RetirementandWills/InvestForRetirement/7MostCommon401kBlunders.aspx); Joanne Sammer, *Managed Accounts: A new direction for 401(k) plans*, Journal of Accountancy, Vol. 204, No. 2 (August 2007), available at: www.aicpa.org/pubs/jofa/aug2007/sammer.htm); Roland Jones, *How Americans Mess Up Their 401(k)s*, MSNBC.com (June 20, 2006), available at: www.msnbc.msn.com/id/12976549/; Bridgitte C. Mandrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. Econ. 4, 1149 (2001), available at: mitpress.mit.edu/journals/pdf/qjec_116_04_1149_0.pdf); Nellie Liang & Scott Weisbenner, 2002, *Investor behavior and the purchase of company stock in 401(k) plan - the importance of plan design*, Finance and Economics Discussion Series 2002-36, Board of Governors of the Federal Reserve System(U.S.), available at: www.federalreserve.gov/pubs/feds/2002/200236/200236pap.pdf).

- Employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward;
- Employees tend not to change their investment option allocations in the plan once made; and
- Lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk.

200. Knowing of these natural biases toward investment of Company Stock, the Loyalty Defendants should have been on high alert to protect the interests of the Participants. The Loyalty Defendants, however, disregarded their duties of loyalty to the benefit of the Company as demonstrated by the Savings Plans' substantial investment of their assets in Sears Stock, which goes against the grain of best investment practices.

201. Because at least some of the Loyalty Defendants were compensated in Sears Stock and owned Sears Stock, and/or were employed by the Company, these Defendants had a conflict of interest which put them in the position of having to choose between their own interests as executives and stockholders, and the interests of the Participants, whose interests Defendants were obligated to loyally serve with an "eye single" to the Savings Plans. *See generally Mertens v. Hewitt Assoc.*, 508 U.S. 248, 251-52 (1993); 29 U.S.C. § 1104(a)(1)(B). These Loyalty Defendants abandoned their duties to the Savings Plans and their Participants, and failed to consider at any time during the Relevant Period what was in the best interest of the Savings Plans and their Participants, as they should have done as Plan fiduciaries.

202. As a consequence of the Loyalty Defendants' breaches of fiduciary duty during the Relevant Period by acting disloyally and by putting the interests of themselves and the Company ahead of the Savings Plans and their Participants, the Savings Plans suffered substantial losses, as

their holdings of Sears Stock were devastated. If the Loyalty Defendants had discharged their fiduciary duties to loyally manage and invest the Savings Plans' assets, the losses suffered by the Savings Plans would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duties alleged herein, the Savings Plans and, indirectly, Plaintiffs and the Savings Plans' other participants, lost a significant portion of their retirement investments.

203. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a), and ERISA § 409, 29 U.S.C. § 1109(a), Defendants in this Count are liable to restore the losses to the Savings Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT III

FAILURE TO ADEQUATELY MONITOR OTHER FIDUCIARIES AND PROVIDE THEM WITH ACCURATE INFORMATION (BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA § 404 BY THE COMPANY AND DEFENDANT LAMPERT)

204. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

205. This Count alleges fiduciary breaches against the Company and Defendant Lampert (the "Monitoring Defendants").

206. As alleged above, the Company was a named fiduciary of the Savings Plans. Additionally, at all relevant times, as alleged above, the Monitoring Defendants were fiduciaries of the Plan, within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

207. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, remove, and, thus, monitor the performance of other Plan fiduciaries.

208. Under ERISA, a monitoring fiduciary must ensure that monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of a plan's assets, and must take prompt and effective action to protect the plan and participants when they are not.

209. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to the plan's participants or for deciding whether to retain or remove them.

210. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan's assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

211. During the Relevant Period, the Monitoring Defendants breached their fiduciary monitoring duties by, among other things:

- failing at least with respect to the Savings Plans' investment in Sears Stock, to properly monitor their appointee(s), to properly evaluate their performance, or to have any proper system in place for doing so, and standing idly by as the Savings

Plans suffered significant losses as a result of the appointees' imprudent actions and inaction with respect to Sears Stock;

- failing to ensure that the monitored fiduciaries appreciated the true extent of the Company's precarious financial situation and the likely impact that financial failure would have on the value of the Savings Plans' investment in Sears Stock;
- to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Savings Plans' assets and, in particular, the Plans' investment in Sears Stock; and
- failing to remove appointees whose performance was inadequate in that they continued to permit the Savings Plans to make and maintain investments in Sears Stock despite the practices that rendered it an imprudent investment during the Relevant Period.

212. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Savings Plans suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Savings Plans would have been minimized or avoided.

213. Therefore, as a direct and proximate result of the breaches of fiduciary duty by the Monitoring Defendants during the Relevant Period alleged herein, the Savings Plans and, indirectly, the Participants, lost substantial retirement savings.

214. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Savings Plans caused by

their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT IV

CO-FIDUCIARY LIABILITY (BREACHES OF FIDUCIARY DUTIES IN VIOLATION OF ERISA § 405 BY ALL DEFENDANTS)

215. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

216. As alleged above, the Company, the Administrative Committee and the Investment Committee Defendants were named fiduciaries of the Savings Plans. During the Relevant Period, the Company, Defendant Lampert, the Administrative Committee, and the Investment Committee (“Co-Fiduciary Defendants”) acted as fiduciaries with respect to the Savings Plans, within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), as set forth above.

217. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), imposes liability on a fiduciary, in addition to any liability which he or she may have had under any other provision of ERISA, if he or she knowingly participates in a breach of fiduciary duty of another fiduciary.

218. The Company is liable under ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), because it had a duty to monitor and evaluate the members of the Administrative Committee and the Investment Committee, but failed to do so, and knew that its fiduciary breaches, as well as the fiduciary breaches of its co-defendants, diminished the value of the Savings Plans’ assets, thereby decreasing the value of the Participants’ retirement savings.

219. Defendant Lambert is liable under ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), because he had a duty to monitor and evaluate the members of the Administrative Committee and the Investment Committee, but failed to do so, and knew that his fiduciary breaches, as well as the

fiduciary breaches of his co-defendants, diminished the value of the Savings Plans' assets, thereby decreasing the value of the Participants' retirement savings.

220. The Administrative Committee is liable under ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), because it permitted the Savings Plans to continue investing in Sears Stock during the Relevant Period when it knew that such investment was imprudent, and knew that its fiduciary breaches, as well as the fiduciary breaches of its co-defendants, diminished the value of the Savings Plans' assets, thereby decreasing the value of the Participants' retirement savings.

221. The Investment Committee is liable under ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), because it permitted the Savings Plans to continue investing in Sears Stock during the Relevant Period when it knew that such investment was imprudent, and knew that its fiduciary breaches, as well as the fiduciary breaches of its co-defendants, diminished the value of the Savings Plans' assets, thereby decreasing the value of the Participants' retirement savings.

222. ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), imposes liability if a fiduciary in the administration of his or her fiduciary responsibilities enables another fiduciary to commit a breach, even without knowledge of the other's breach.

223. The Company is liable under ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), because it had a duty to monitor and evaluate the members of the Administrative Committee and the Investment Committee, but failed to do so, thus enabling the Administrative and the Investment Committees to commit their respective fiduciary breaches.

224. Defendant Lambert is liable under ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), because he had a duty to monitor and evaluate the members of the Administrative Committee and the Investment Committee, but failed to do so, thus enabling the Administrative and the Investment Committees to commit their respective fiduciary breaches.

225. The Administrative Committee is liable under ERISA § 405(a)(2) 29 U.S.C. § 1105(a)(1), because it is a named fiduciary and it permitted the Savings Plans to continue investing in Sears Stock during the Relevant Period when such investment was imprudent, thus enabling its co-fiduciaries to commit their respective fiduciary breaches.

226. The Investment Committee is liable under ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(1), because it is a named fiduciary and it permitted the Savings Plans to continue investing in Sears Stock during the Relevant Period when such investment was imprudent, thus enabling its co-fiduciaries to commit their respective fiduciary breaches.

227. ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3), imposes liability on a fiduciary, in addition to any liability which he or she may have had under any other provision of ERISA, if it knows of a breach by another fiduciary and fails to remedy it. Even if the fiduciary merely knows of a breach that it had no connection with, the fiduciary must take steps to remedy the breach.

228. The Company, Defendant Lampert, the Administrative Committee, and the Investment Committee Defendants, each of whom were fiduciaries under ERISA, knew of each breach of fiduciary duty alleged herein arising from the Savings Plans' imprudent investment in Sears Stock, participated in each other's violations of ERISA, enabled each other's violations of ERISA, and took no steps to remedy those violations of ERISA. As such, each is liable for the fiduciary breaches of the others pursuant to ERISA § 405(a)(1), (2), and (3), 29 U.S.C. § 1105(1), (2), and (3).

229. As a direct and proximate result of these fiduciary breaches, the Savings Plans, and indirectly Plaintiff and the Savings Plans' other Participants, lost millions of dollars due to the imprudent investment of the Savings Plans in the Sears Stock.

230. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), the Co-Fiduciary Defendants are liable to restore the losses to the Savings Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

- A. A Judgment that the Defendants, and each of them, breached their ERISA fiduciary duties to the Participants during the Relevant Period;
- B. A Judgment compelling Defendants to make good to the Savings Plans all losses to the Savings Plans resulting from the Defendants' breaches of their fiduciary duties, including losses to the Savings Plans resulting from imprudent investment of the Savings Plans' assets, and to restore to the Savings Plans all profits the Defendants made through use of the Savings Plans' assets, and to restore to the Savings Plans all profits which the Participants would have made if the Defendants had fulfilled their fiduciary obligations.
- C. A Judgment imposing a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Savings Plans as the result of breaches of fiduciary duty;
- D. A Judgment awarding actual damages in the amount of any losses the Savings Plans suffered, to be allocated among the Participants' individual accounts in proportion to the accounts' losses;
- E. A Judgment requiring that Defendants allocate the Savings Plans' recoveries to the accounts of all Participants who had any portion of their account balances invested in Sears Stock

maintained by the Savings Plans in proportion to the accounts' losses attributable to the decline in the price of Sears Stock;

F. A Judgment awarding costs pursuant to 29 U.S.C. § 1132(g);

G. A Judgment awarding attorneys' fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine; and

H. A Judgment awarding equitable restitution and other appropriate equitable relief against the Defendants.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED this 10th day of August, 2017.

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