

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE BANKRUPTCY OF SHS SERVICES MANAGEMENT
INC./GESTION DES SERVICES SHS INC. AND SHS SERVICES LIMITED
PARTNERSHIP**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c.B-3, AS AMENDED;**

**FACTUM OF THE RESPONDENT LICENSEES
1447000 ONTARIO LTD. ET AL ON THE MOTION OF THE RECEIVER
RETURNABLE APRIL 28, 2015**

WILSON VUKELICH LLP

Barristers and Solicitors
60 Columbia Way, Suite 710
Markham ON L3R 0C9

Douglas D. Langley LSUC# 16909Q

dlangley@wvllp.ca

Tel: (905) 940-8711 (ext. 2232)

Fax: (905) 940-8785

Lawyers for the Respondents 1447000 Ontario
Ltd., Gestion Cristofaro Ltee, 3543978 Canada
Inc., 1812731 Ontario Inc. o/a Sears Indoor
Clean Air Services, 77911 Alberta Ltd. o/a
Sears Clean Air Services, 977218 Ontario Inc.,
709999 Alberta Ltd., 484081 BC Ltd.,
1847135 Ontario Inc., and 2177059 Ontario
Inc. cob Sears Indoor Clean Air

TO: **SERVICE LIST**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE BANKRUPTCY OF SHS SERVICES MANAGEMENT
INC./GESTION DES SERVICES SHS INC. AND SHS SERVICES LIMITED
PARTNERSHIP**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c.B-3, AS AMENDED;**

**FACTUM OF THE RESPONDENT LICENSEES
1447000 ONTARIO LTD. ET AL ON THE MOTION OF THE RECEIVER
RETURNABLE APRIL 28, 2015**

PART I - OVERVIEW

1. The Respondents in this motion are former carpet cleaning and duct cleaning licensees who found themselves enjoined from seeking work from other service providers, when SHS was put into Receivership even though SHS was permanently out of business. These Respondents therefore requested that the stay order be lifted against them to alleviate the hardship that this was causing to them. On February 4, 2014, this Court granted an order lifting the stay order as against the Respondents and declared the License Agreements (as defined below) terminated. His Honour's Endorsement stated that the Order was granted without prejudice to the right of the Respondents to take the position that the License Agreements were terminated at an earlier date. The Order also required each of the Respondents to provide the Receiver with an accounting of the work performed during the 53 days it took for the Respondents to get the Order declaring their License Agreements terminated, which accounting was delivered to the Receiver.

2. Of the fourteen licensees who were Applications to the February 4, 2014, motion before Mr. Justice Wilton-Siegel, ten are Respondents to this motion brought by the Receiver. They are as follows:

- (a) 144700 Ontario Ltd.
- (b) 484081 B.C. Ltd
- (c) 709999 Alberta Ltd.
- (d) 777911 Alberta Ltd.
- (e) 3543978 Canada Inc.
- (f) Gestion Cristofaro Ltée
- (g) 977218 Ontario Inc.
- (h) 1847135 Ontario Inc.
- (i) 1812731 Ontario Inc.
- (j) 2177059 Ontario Inc.

3. The Receiver has brought this motion seeking payment of commissions it claims to be owing to SHS under the License Agreements for the worked performed during these 53 days despite existing set off claims by the Respondents for commissions owing to them under the License Agreements which are well in excess of any amount being claimed by the Receiver and despite the Receiver's repudiation of the License Agreements on or about December 14 or 16, 2013.

PART II - THE FACTS

4. Sears has been providing home services to its customers for many years. Two of the services, being carpet cleaning and duct cleaning, were provided on behalf of Sears by small operators which entered into licensee agreements setting out the terms and conditions of their contractual relationships with Sears. Each licensee had a designated territory, however it did not have an exclusive right to market the services in that designated area. Many of the Respondents were long term licensees of Sears, up to 20 years.

Affidavit of 1447000 Ontario Ltd. sworn January 20, 2014, para.2 , Respondents Record, Volume I, Tab 5

Affidavit of 484081 B.C. Ltd. sworn January 18, 2014, para. 2 , Respondents Record, Volume I, Tab 6

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro Ltée sworn January 21, 2014, para. 2, , Respondents Record, Volume II, Tab 10

5. In recent years, Sears had standard form contracts for both the carpet cleaning business and the duct cleaning business.

Affidavit of 484081 B.C. Ltd. sworn January 18, 2014, para. 3 , Respondents Record, Volume I, Tab 6

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro Ltée sworn January 21, 2014, paras. 3 & 6, , Respondents Record, Volume II, Tab 10

6. By an agreement dated December 20, 2012, called the Branded Concession Agreement, Sears granted to SHS the right to operate the full suite of interior and exterior home renovations, repairs, and home maintenance services provided by Sears, including the carpet cleaning and duct cleaning services. Pursuant to another agreement dated December 20, 2012, called the Asset Transfer Agreement, Sears transferred to SHS those assets needed to carry out the Branded Concession Agreement. Section 2.8 (f) of the Asset Transfer Agreement stated as follows:

Section 2.8 Transferred Assets

The Transferred Assets consist of the property, assets, rights and interests of the Transferor in the following only (collectively, the “Transferred Assets”):

- (f) ***Contracts*** *All of the Transferor’s right, title and interest in and to all contracts, agreements, instruments and arrangements at the Closing Time with (i) customers of the Business (“Customer Contracts”); (ii) Contractors; and (iii) Licensees (“Licensed Contracts”)(***but the Transferred Assets shall not include***)*

any right, title or interest in Intellectual Property of the licensor in the Licensee Contracts*[our emphasis] (collectively, the “Contracts”).*

Asset Transfer Agreement, Exhibit “A” to the Affidavit of Daniel Westreich Sworn January 7, 2014, Supplementary Respondents Record, Tab 10

7. Under the Branded Concession Agreement, SHS was granted the bare license to use Sears’ trademarks. Under the agreement, Sears has the sole right to take such action as it determines, in its sole discretion, to be appropriate to enforce its rights to its trademarks. To that end, SHS expressly waived the provisions of subsection 50(3) of the Trade-marks Act R.S.C. 1985 C. T-13 as amended, which provision grants the right to a licensee, under limited circumstances, to commence proceedings for infringement of the owner’s trademarks.

Branded Concession Agreement, Appendix B to the First Report of the Interim Receiver dated December 20, 2013, , Supplementary, Respondents Record Tab 11, sections 16.1, 16.5 and 16.6

8. The Branded Concession Agreement further provides that Sears’ goodwill, including customer lists, customer information, sales information belong exclusively to Sears and that Sears shall have sole copyright over such customer information and lists.

Branded Concession Agreement, Appendix B to the First Report of the Interim Receiver dated December 20, 2013, , Supplementary, Respondents Record Tab 11, section 18.1

9. None of the Respondents were asked to sign a renewal or a new licensee agreement with SHS until new forms of draft licensee agreements were sent from SHS in November 2013, but

none of the Respondents signed this agreement as its terms were onerous. In June 2013 some of the Respondents had been asked by SHS to sign, and did sign, a short document called “Amending Agreement” which purported to replace all references to “Sears” with “SHS” in the old Sears licensee agreements, and made some changes to the compensation payments.

Affidavit of 1447000 Ontario Ltd. sworn January 20, 2014,
paras. 4&5, Respondents Record, Volume I, Tab 5

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro
Ltée sworn January 21, 2014, para.7, Respondents Record,
Volume II, Tab 9

10. On December 13, 2013 SHS attended before the Honourable Mr. Justice Morawetz and obtained an order appointing PWC as Interim Receiver. This Order was obtained ex parte except for the presence of counsel for Sears and for PWC. The order contained, at paragraphs 10 and 11, the stay wording from the standard template receivership order.

11. The Respondents are significant creditors of the receivership. SHS had stopped paying the Respondents at various times prior to the date of the order, and on December 13, 2013 these Respondents were owed a total of \$597,478.84 for services rendered but not yet paid. These amounts were never questioned by the Receiver in these proceedings. Particulars of the amounts owing to the Respondents on December 13, 2013 and the amounts claimed by the Receiver on this motion are attached hereto as Schedule “C”. It should be noted that of the 17.5% royalty claimed by the Receiver on this motion, 5^{1/4}% of such amount consists of merchant fees and commission owed to Sears and not SHS.

September 15, 2014 letter from the Receiver to Wilson
Vukelich, Motion Record of the Receiver, Tab F

Affidavit of 1447000 Ontario Ltd. sworn January 20, 2014,
para.6, Respondents Record, Volume I, Tab 5

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro
Ltée sworn January 21, 2014, para. 9, Respondents Record,
Volume II, Tab 9

September 15, 2014 letter from the Receiver to Wilson
Vukelich, Motion Record of the Receiver, Tab F

12. On December 23, 2013 the Interim Receiver (not Sears) moved a motion to obtain leave of the court to lift the stay as against Sears to permit Sears to deliver Notice of Termination of the Branded Concession Agreement upon two weeks written notice to the debtor with a copy to the Interim Receiver, or with the written consent of the Interim Receiver, or pursuant to further Order of the court. There was an exception stated in that paragraph, (which became paragraph 13 of the Order of December 23, 2013), which set out that such termination shall in no way affect the rights of the debtors to operate the water heater rental business, relieve Sears of the obligation to support that business, or in any way restrict the sale of the water heater business. S.25.7 of the Branded Concession Agreement gave Sears the right, but not the obligation, to take back from SHS all of the contracts being used by SHS to operate the concession, upon termination of that agreement.

Order of December 23, 2013, Respondents Supplementary
Record, Tab 13

Branded Concession Agreement, Appendix B to the First
Report of the Interim Receiver dated December 20, 2014,
Supplementary Respondents Record, Tab 11

13. The initial order of December 13, 2013 was set to expire in 30 days. As a result, counsel for Sears moved a motion to continue the receivership under S. 243 (1) of the Bankruptcy and Insolvency Act, which Order was granted by the Honourable Mr. Justice Brown on January 9,

2014. On that date, counsel for the Respondents advised the court that they would be moving a separate motion to deal with their difficulties at the next available court date. In the January 9, 2014 Order the wording of the stay paragraphs in question did not change except that they were numbered paragraphs 14 and 15. The paragraph granting Sears leave to terminate the Branded Concession Agreement is now paragraph 16.

Order of January 9, 2014,
Respondents Record, Volume I, Tab 2

14. On December 14, 2013, the Receiver took down the whole SHS Centah computer program, and since that dated no leads or service calls went to the Respondents from SHS. In an email sent by the Receiver on December 16, 2013, it was stated that the Receiver would not be carrying on or continuing the operations of SHS, except for very limited transitional services. In the affidavit of Daniel Westreich, Vice President of Sears, sworn January 7, 2014, to support Sears's motion of January 9, 2014, Mr. Westreich stated that the Interim Receiver had suspended substantially all of the business operations of the debtors.

Affidavit of 1447000 Ontario Ltd. sworn January 20, 2014,
para.7, Respondents Record, Volume I, Tab 5

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro
Ltée sworn January 21, 2014, para. 10, Respondents Record,
Volume II, Tab 9

Affidavit of Daniel Westreich sworn January 7, 2014,
para.8, Respondents Record, Volume I, Tab 1

15. Contrary to paragraph 8(a) of the Receiver's , Supplementary Report, the Receiver did not actively seek to resume the work performed by the Respondents. In addition to the aforesaid, the Receiver's position in this regard was confirmed by the Receiver in its First and Second Reports to the Court:

- (a) In the Receiver's First Report, PWC advised the Court that "The Interim Receiver is not currently accepting new orders for Services under the [Branded Concession Agreement]. Orders for Services that were received by SHS prior to the Date of Appointment and which have not yet resulted in installations or other work performed in customer homes (the 'Work in Progress') are being reviewed and evaluated to determine whether and how they will be completed, and on what terms they may be completed"
- (b) In the Receiver's Second Report, PWC explained to the court that there were unfulfilled work orders which the Interim Receiver was endeavouring to complete. To do so, the Interim Receiver did not rely on the old Sears licensee agreements, but rather created a short contract called the "Confirmation Agreement" which set out the terms under which licensees or subcontractors who wished to participate could help complete the last work orders and be paid by PWC. This project was scheduled to be completed by January 11, 2014 with a possibility of an extension to January 17, 2014, however none of the Respondents herein chose to sign the "Confirmation Agreement".

First Report of the Interim Receiver dated December 20, 2013, paras. 14 and 15, Supplementary Respondents' Record, Tab 11

Second Report of the Interim Receiver dated January 7, 2014, paras. 12 to 26, Supplementary Respondents' Record, Tab 12

16. Nowhere in either the First or the Second Report of the Interim Receiver is there any suggestion by the Receiver that the old Sears carpet cleaning or duct cleaning licensee agreements

represent a valuable asset of the receivership or that the Receiver has any plans to try to sell those licensee agreements. By contrast, in the Second Report the Interim Receiver dealt extensively with its efforts to find a buyer for the water heater rental business and proposed to the court a sales process for the rental portfolio.

Second Report of the Interim Receiver dated January 7, 2014, paras. 50 to 57, Supplementary Respondents' Record, Tab 12

17. After the receiver notified the Respondents that it would not be carrying on or continuing the operations of SHS, the Respondents attempted to obtain work from other service providers. The Respondents however suffered great hardship because of the stay in the court order. The Respondents were unable to obtain work from other service providers who were not prepared to risk being in violation of the court order. The Respondents therefore found themselves trapped in an artificial business relationship which they could not leave with a company which was in liquidation.

Affidavit of 1447000 Ontario Ltd. sworn January 20, 2014, paras 9 to 11, Respondents Record, Volume I, Tab 5

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro Ltée sworn January 21, 2014, paras 12 to 14, Respondents Record, Volume II, Tab 9

18. As set out above, on December 14, 2013, the Receiver took down the whole SHS Centah computer program, and since that date no leads or service calls went to the Respondents from SHS. As a result of the Receiver's actions, all of the Respondents suffered a large loss of business, some in excess of 50%. A number of Respondents laid off employees, and owners stopped drawing their own salaries. Some owners were forced to inject some of their savings into their companies to

keep them from shutting down. One of the Respondents closed his doors and another closed two of his three locations.

Affidavit of 1447000 Ontario Ltd. sworn January 20, 2014
paras. 9 & 11, Respondents' Record, Volume I, Tab 5

Affidavit of 484081 B.C. Ltd. sworn January 18, 2014,
para.13, Respondents' Record, Volume II, Tab 6

Affidavit of 709999 Alberta Ltd. sworn January 17, 2014,
paras. 9&11, Respondents' Record, Volume II, Tab 7

Affidavit of 1847135 Ontario Inc. sworn January 21, 2014,
para.8, Respondents' Record, Volume III, Tab 11

19. On January 14, 2014, and in order to address the concerns of other service providers, the Respondents requested that the Receiver consent to the release of the Respondents from the stay as permitted by paragraph 14 of the order of January 9, 2014, however the Receiver declined.

Affidavit of Janis Griffin sworn January 7, 2014,
Respondents' Record Volume III, Tab 14

20. These Respondents therefore brought a motion and requested that the stay order be lifted against them to alleviate the hardship that this was causing to them. On February 4, 2014, the Honourable Justice Wilton-Seigel granted an Order lifting the stay order as against the Respondents and declared the License Agreements (as defined below) terminated. The Endorsement of His Honour stated that the Order was granted without prejudice to the right of the Respondents to take the position that the License Agreements were terminated at an earlier date. The Order also required that each of the Respondents provide the Receiver with an accounting of the work performed during the 53 days it took for the Respondents to get the Order declaring their

License Agreements terminated, being between December 13, 2013 and February 4, 2014 (hereafter the “Relevant Period”).

Order of February 4, 2014, with endorsement
Respondents’ Record, Volume I, Tab 3

21. Further to the termination of the License Agreements, 3 of the Respondents had already ceased using all Sears Canada Inc.’s (hereafter “Sears”) trademarks in connection with their businesses prior to the Relevant Period. The remaining seven Respondents began the process of removing the Sears trademarks from their businesses, although they had not completed this process during the Relevant Period. It is important to note however that had the Respondents’ License Agreements been properly terminated in accordance with the terms of their License Agreements (see section 19.1) the Respondents would have had sixty (60) days prior notice of termination, during which time they would have had the opportunity to ensure that all Sears marks were removed from their businesses on termination.

Answers to Interrogatory Questions of Respondents paras 2
and 3 of each Respondents’ Answers, Supplementary
Respondents’ Record, Tabs 1 to 9

License Agreement, Exhibit “A” to the Affidavit of 1447000
Ontario Ltd. sworn January 20, 2014 para. 19.1,
Respondents’ Record, Volume I, Tab 5

22. Further, during the Relevant Period, those Respondents who continued to have Sears trademarks at their businesses during the Relevant period were discussing with Sears the possibility of renewing their old agreements with Sears, which could have made it unnecessary to remove Sears’ marks from their respective businesses. In fact, one of the Respondents has since

entered into a new license agreement with Sears and two other Respondents continue to do warranty service work for Sears to this date.

Answers to Interrogatory Questions of Respondents, paras 2
and 3, Supplementary Respondents' Record, Tabs 1 to 9

23. The accounting for the work performed during the Relevant Period was delivered by letter to the Receiver on February 14, 2014, pursuant to the February 4, 2014 Order. In that same letter, the Respondents enclosed details of the calculation of their respective set off amounts and advised the Receiver that none of the Respondents owe any amount to the Receivership, in any event, due to the Receiver's repudiation of the License Agreements and the Respondents existing set off claims for commissions owing to them under the License Agreements which are all well in excess of any amount that is claimed by the Receiver.

February 14, 2014 letter from Wilson Vukelich to the
Receiver, Motion Record of the Receiver, Tab E

24. Despite the foregoing, the Receiver has brought this motion seeking payment of amounts it claims to be owing to SHS under the License Agreements for the work performed during the Relevant Period. For the first time in these proceedings, the Receiver has raised in its factum a claim for unjust enrichment as against the Respondents for the work they performed during the Relevant Period.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Argument in Receiver's Factum Re Expiration of License Agreements

25. At no point in these proceedings have the Respondents ever taken the position that the License Agreements were terminated as a consequence of the expiration of their terms. Accordingly, the merits of the arguments raised by the Receiver at paragraphs 19 to 32 of its

factum with respect to expiration of the terms of the License Agreements are not debated in this factum, as they are irrelevant to this motion.

Repudiation and/or Frustration of the License Agreements

26. Repudiation of a contract takes place when one of the parties to a contract, by words or conduct, evinces an intention not to be bound by the terms of the contract. “If the non-repudiating party accepts the repudiation, the contract is terminated and the parties are discharged from future obligations”.

Globex Foreign Exchange Corporation v. Kelcher, 2011
ABCA 240 paras 46 and 47

27. Under the common law doctrine of frustration, a contract is frustrated when the following is satisfied:

“The event in question must have occurred after the formation of the contract and cannot be self-induced. The contract must, as a result, be totally different from what the parties had intended. This difference must take into account the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties. Finally, the act or event that brought about such radical change must not have been foreseeable.”

Folia v. Trelinski (1997) B.C.J. No. 2417 at para. 18

28. Pursuant to the *Frustrated Contracts Act* R.S.O. 1990, c. F.34. (hereafter the “Act”), any contract governed by the law of Ontario that has become impossible to perform or been otherwise frustrated discharges the parties from further performance of the contract. Section 3(1)(b) of the

Act provides that sums payable to a party in pursuance of a contract before the parties were discharged are no longer payable.

29. As set out above, on December 14, 2013, the Receiver took down the whole SHS Centah computer program thereby preventing the Respondents from getting any leads or service calls through SHS. Thereafter, on December 16, 2013, the Receiver sent an email to the Respondents stating that the Receiver would not be carrying on or continuing the operations of SHS, except for very limited transitional services. The Respondents submit that the Receiver by its aforesaid conduct and words evinced an intention to not be bound by the License Agreements and in so doing frustrated the License Agreements on or about December 14 or 16, 2013, which repudiation and/or frustration was accepted by the Respondents as they attempted to obtain work from other service providers. Accordingly, The Respondents submit that they were discharged from further performance of the License Agreements on or about December 14 or 16, 2013, and any sums which would have been payable to the Receiver under the License Agreements ceased to be payable as of such date.

Unenforceability of Restrictive Covenants

30. In *Gerrard v. Century 21 the Court* established that once a contract of service is wrongfully terminated, the restrictive covenants are no longer enforceable. In *Gerrard*, The Court cited, with approval, the House of Lords decision in *General Billposting Co. v. Atkinson*, [1909] A.C. 118, [1908-10] All E.R. Rep. 619. In that case, the Applicant company terminated the employee without the notice required by the terms of the employment contract. The House of Lords held that having failed to provide notice as required under the contract, the Applicant had repudiated the contract and could no longer rely on the restrictive covenants found therein. A more recent

application of the law in this regard is found in the Court of Appeal's decision in *Globex v. Kelcher*.

Gerrard v. Century 21 Armour Real Estate Inc., (1991) 4
O.R. (3d) 191 para 13

Globex paras 48-58

31. As set out above, section 19.1 of the License Agreements gave the Receiver the option of terminating the License Agreements by giving the Respondents notice of at least sixty (60) days prior written notice of such termination. However, as set out at paragraphs 14 and 15 above, the Receiver opted instead to repudiate and/or frustrate the License Agreements on or about December 14 or 16, 2013. Accordingly, the Respondents were not bound by the terms of the License Agreements thereafter, and in particular, the restrictive covenants contained therein.

Right to Equitable Set-Off

32. Should this Court find that the Respondents continued to be bound by the License Agreements until the License Agreements were declared terminated by the February 4, 2013 Order, the Respondents submit that they are entitled to set off all amounts owing to it by SHS against its corresponding obligations to SHS under the License Agreements pursuant to the doctrine of equitable set-off.

33. The legal principles applicable to equitable set-off are well established:

- (a) The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.

- (b) The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
- (c) A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
- (d) The plaintiff's claim and the cross-claim need not arise out of the same contract.
- (e) Unliquidated claims are on the same footing as liquidated claims.

Telford v. Holt (1987) 2. S.C.R. 193 para 33

34. Equitable set-off is available where the cross-obligations arise under the same contract. Further, Equitable set-off does not require the mutuality of obligations, and as such, is available between pre-receivership and post-receivership obligations.

Telford para 26

Scanwood Canada Ltd. (Re), 2011 NSSC 468 paras 32

35. Further, valid set-off applies during a receivership subject only to fraud or fraudulent preference.

Scanwood para 45

36. The Respondents meet all of the principles to be applied when considering a claim for equitable set-off. If the License Agreements were not repudiated on or about December 14 or 16, 2013, then the receiver's claim on this motion arises under the very License Agreements under which the set-off claims arise. The Respondents set-off claims go to the very root of the claims advanced by the Receiver. The Respondents submit that it would be manifestly unjust to enforce

the terms of the License Agreements against the Respondents at the request of the Receiver, who was itself no longer prepared to be bound by the terms of the License Agreements, without allowing set-off.

37. Finally, as set out at paragraph 11 above, of the 17.5% or 12% royalty claimed by the Receiver as against each Respondent, 5^{1/4}% of such amount consists of merchant fees and commission owed to Sears and not SHS.

September 15, 2014 letter from the Receiver to Wilson
Vukelich, Motion Record of the Receiver, Tab F

Claim for Unjust Enrichment

38. The Respondents agree that the test for unjust enrichment is well established and includes the following three elements:

- (a) The enrichment of one party;
- (b) The corresponding deprivation of the other party; and
- (c) The absence of a juristic reason for the enrichment.

Peter v. Beblow, [1993] 1 S.C.R. 980 at 3.

39. At paragraphs 33 to 48 of its factum, for the first time in these proceedings, the Receiver requests that the Respondents be found liable to SHS for unjust enrichment in the amounts claimed by the Receiver on the basis of *quantum meruit*. In particular, the Receiver submits that SHS was somehow deprived as a result of: (1) the appearance of Sears trademarks at the businesses of some Respondents during the relevant period (three of the Respondents had removed all Sears marks

from their businesses prior to the Relevant Period); (2) Sears' good will; (3) an advertising infrastructure allegedly established by Sears and/or SHS, over which the Respondents had no control; and, (4) the existing client relationships of Sears and SHS. The Receiver also claims at paragraph 38 of its factum that the Respondents acted in violation of the restrictive covenants of the License Agreements, which the Receiver claims survived termination.

40. For the reasons set out at paragraphs 30 and 31 above, the Respondents submit that they are not bound by the restrictive covenants found in the License Agreements as a result of the Receiver's repudiation and/or frustration of those agreements.

41. As regards the Sears and/or SHS advertising infrastructure which was allegedly in place during the Relevant Period, the Receiver took down the whole SHS Centah computer program on December 14, 2013, and since that date no leads or service calls went to the Respondents from SHS. Any service calls received by the Respondents were generated by their own local advertising and/or their reputations in the community. Accordingly, the Respondents did not benefit from any alleged advertising infrastructure in place during the Relevant Period. Additionally, the Respondents had no control over the actions of SHS and/or Sears in this regard and it would therefore be unjust to allow the Receiver to recover any amounts from the Respondents for any alleged benefit the Receiver claims the Respondents derived from this alleged infrastructure.

Affidavit of 1447000 Ontario Ltd. sworn January 20, 2014,
para.7, Respondents Record, Volume I, Tab 5

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro
Ltée sworn January 21, 2014, para. 10, Respondents Record,
Volume II, Tab 9

42. With respect to the claim of the Receiver as to the alleged use by Respondents of Sears marks, Sears good will and Sears customer lists, Sears has the sole right to take such action as it determines to be appropriate, in its sole discretion, to enforce its rights to its property (see paragraphs 6 to 8 above). Accordingly the Receiver has no standing to assert damages, unjust enrichment or *quantum meruit* based on the use of Sears property by the Respondents. Sears has chosen not to enforce its rights as against the Respondents. In fact, some of the Respondents continue to do work for Sears to this date.

Answers to Interrogatory Questions of 144700 Ontario Ltd.
484081 B.C. Ltd. And 709999 Alberta Ltd., paras 2 and 3
of each Respondents' Answers, Supplementary
Respondents' Record, Tabs 1 to 3.

43. The Respondents submit that the Receiver, being a non-exclusive licensee of Sears, has failed to establish that it suffered a corresponding deprivation as a result of the work performed by the Licensees after the termination of their License Agreements. Not only would such a finding be purely speculative, but also not possible, as the Receiver did not carry on or continue the operations of SHS during the Relevant Period, except for very limited transitional services.

44. Finally, the Respondents submit that any benefit derived by the Respondents would no longer be payable to the Receiver in accordance with section 3(1)(b) of the *Frustrated Contracts Act* and therefore there is a juristic reason for the benefit.

45. In light of the foregoing, the Respondents submit that the Receiver's claim for unjust enrichment must also fail.

PART IV - ORDER REQUESTED

46. The Respondents request an order dismissing the motion of the Receiver as against the Respondents for amounts it claims is owing to it for work performed by the Respondents between December 13, 2013 and February 4, 2014 as well of their costs of this motion to be fixed by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of April, 2015.



Douglas D. Langley

WILSON VUKELICH LLP

Barristers and Solicitors
60 Columbia Way, Suite 710
Markham ON L3R 0C9

Douglas D. Langley LSUC# 16909Q

dlangley@wvllp.ca

Tel: (905) 940-8711 (ext. 2232)

Fax: (905) 940-8785

Lawyers for the Respondents 1447000 Ontario Ltd., Gestion Cristofaro Ltee, 3543978 Canada Inc., 1812731 Ontario Inc. o/a Sears Indoor Clean Air Services, 77911 Alberta Ltd. o/a Sears Clean Air Services, 977218 Ontario Inc., 709999 Alberta Ltd., 484081 BC Ltd., 1847135 Ontario Inc., and 2177059 Ontario Inc. cob Sears Indoor Clean Air

SCHEDULE “A”

LIST OF AUTHORITIES

1. ***Globex Foreign Exchange Corporation v. Kelcher***, 2011 ABCA 240
2. ***Folia v. Trelinski*** (1997) B.C.J. No. 2417
3. ***Gerrard v. Century 21 Armour Real Estate Inc.***, (1991) 4 O.R. (3d) 191
4. ***Telford v. Holt*** (1987) 2. S.C.R. 193
5. ***Scanwood Canada Ltd. (Re)***, 2011 NSSC 468

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. ***Frustrated Contracts Act***, R.S.O. 1990, c. F.34; S.O. 1993, c. 27, Sched., as amended

SECTION 1

Definitions

1. In this Act,

"contract" includes a contract to which the Crown is a party; ("contrat")

"court" means the court or arbitrator by or before whom a matter falls to be determined; ("tribunal")

"discharged" means relieved from further performance of the contract. ("libéré")

R.S.O. 1990, c. F.34, s. 1.

SECTION 2

Application of Act

2.--(1) This Act applies to any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged.

R.S.O. 1990, c. F.34, s. 2 (1); S.O. 1993, c. 27, Sched.

SECTION 3

Adjustment of rights and liabilities

3.--(1) The sums paid or payable to a party in pursuance of a contract before the parties were discharged,

(a) in the case of sums paid, are recoverable from the party as money received for the use of the party by whom the sums were paid; and

(b) in the case of sums payable, cease to be payable.

2. ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3, s. 97(3), as amended

PART IV PROPERTY OF THE BANKRUPT Preferences and Transfers at Undervalue

SECTION 97(3)

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

SCHEDULE “C”

PARTICULARS OF AMOUNTS OWED TO RESPONDENTS ON DECEMBER 13, 2013 AND AMOUNTS CLAIMED BY THE RECEIVER

Respondent	Amount Owing by SHS	Amount Claimed by Receiver
144700 Ontario Ltd.	\$32,000.00	\$18,618.40
484081 B.C. Ltd	\$66,173.83	\$55,630.72
709999 Alberta Ltd.	\$127,823.31	\$97,181.59
777911 Alberta Ltd.	\$36,294.30	\$24,061.52
3543978 Canada Inc.	\$99,988.89	\$12,196.71
Gestion Cristofaro Ltée	\$77,142.70	\$9,023.40
977218 Ontario Inc.	\$47,000.00	\$30,388.08
1847135 Ontario Inc.	\$45,396.80	\$5,034.89
1812731 Ontario Inc.	\$26,661.73	\$9,702.05
2177059 Ontario Inc.	\$38,997.28	\$4,458.26
Total:	\$597,478.84	\$266,295.62

See:

Affidavit of 144700 Ontario Ltd. sworn January 20, 2014, para 6, Respondents' Record, Volume I, Tab 5

Affidavit of 484081 B.C. Ltd. sworn January 18, 2014, para 5, Respondents' Record, Volume I, Tab 5

Affidavit of 709999 Alberta Ltd. sworn January 17, 2014, para 6, Respondents' Record, Volume I, Tab 5

Affidavit of 777911 Alberta Ltd. sworn January 20, 2014, para 5, Respondents' Record, Volume I, Tab 5

Affidavit of 3543978 Canada Inc. and Gestion Cristofaro Ltée sworn January 21, 2014, para 9, Respondents' Record, Volume I, Tab 5

Affidavit of 977218 Ontario Inc. sworn January 21, 2014, para 7, Respondents' Record, Volume I, Tab 5

Affidavit of 1847135 Ontario Inc. sworn January 21, 2014, para, Respondents' Record, Volume I, Tab 5

Affidavit of 1812731 Ontario Inc. sworn January 20, 2014, para 6, Respondents' Record, Volume I, Tab 5

Affidavit of 2177059 Ontario Inc. sworn January 28, 2014, para 6, Respondents' Record, Volume I, Tab 5

IN THE MATTER OF THE BANKRUPTCY OF SHS SERVICES
MANAGEMENT INC./GESTION DES SERVICES SHS INC. AND SHS
SERVICES LIMITED PARTNERSHIP

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF
THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c.B-3, AS
AMENDED

Court File No. CV-13-10370-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDENT LICENSEES
ON THE MOTION OF THE RECEIVER RETURNABLE
APRIL 28, 2015

WILSON VUKELICH LLP

Barristers and Solicitors
60 Columbia Way, Suite 710
Markham ON L3R 0C9

Douglas D. Langley (16909Q)

dlangley@wvllp.ca

Tel: (905) 940-8711

Fax: (905) 940-8785

Lawyers for the Respondents

File Number: 03-2079