

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action)
SUPERIOR COURT

NO: 500-06-000769-154

LEON BERROS

Petitioner

-vs-

SEARS CANADA, INC.

Respondent

**AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
AND TO APPOINT THE STATUS OF REPRESENTATIVE**
(ARTICLE 571 AND FOLLOWING C.C.P.)

**TO THE HONOURABLE FLORENCE LUCAS, J.C.S., DESIGNATED TO HEAR THE PRESENT
CLASS ACTION, YOUR PETITIONER STATES AS FOLLOWS:**

I. GENERAL PRESENTATION

A) THE ACTION

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

All persons in Canada (subsidiarily Quebec) who, since October 13th, 2012, ordered or purchased any goods or services from the Respondent by internet, by phone, by catalogue, and/or in-store (hereinafter the "**Purchase**"), and who, after receiving a confirmation of their Purchase from Sears at the price which it initially advertised, subsequently had their Purchase cancelled by the Sears, who did not respect the price it initially advertised.

or any other group to be determined by the Court.

(hereinafter referred to as the "**Group**" [...])

2. The Respondent Sears Canada Inc. (hereinafter “Sears”) is a chain of department stores across Canada;
3. The Respondent’s online presence also enables it to enter into distance contracts with consumers and thus carry on business across Canada;
4. In the course of its business it has occurred on many occasions that the Respondent advertises a good or service for a specific price (hereinafter the “**Advertised Price**”), processes Group members’ orders and Purchases at the Advertised Price, sends the Group members an order confirmation showing the advertised price, charges the Group members’ credit card and then unlawfully cancels the Group members’ Purchase, claiming that the Advertised Price was an error;
5. The Respondent has the obligation to sell the goods at the Advertised Price, as well as to deliver the goods or to perform the services stipulated in the contract;
- 5.1 Under Quebec consumer protection law, the Respondent is deemed to have made an offer to enter into a distance contract since its proposal comprised all the essential elements of the intended contract (including the price and detailed item description), and this regardless of whether the Respondent indicates its willingness to be bound in the event the proposal is accepted and even if there is an indication to the contrary;
6. Consequently, the Respondent violates Quebec’s *Consumer Protection Act* (hereinafter the “**CPA**”) every time that it cancels a Group member’s Purchase, and defaults on its obligation to sell the goods at the Advertised Price;
- 6.1 Additionally, Respondent operates in Canada in violation of section 52 the *Competition Act* (hereinafter the “**Competition Act**”), as well as in violation of the consumer protection and trade practice legislation in the various Canadian jurisdictions (more fully described herein at **paragraph 22.2**) because they recklessly make a representation to the public that is false or misleading in a material respect;
- 6.2 Group members and consumers are justified in presuming that a product has gone through a serious price verification process before being offered for sale by Respondent on its website to millions of people across Canada;
- 6.3 Respondent acknowledges that it has, **repeatedly**, incorrectly advertised the price of its products by error, including pricing errors on the following items, during the 12-month period between **January 2015 and January 2016** alone:
 - a) mattress purchased by Petitioner (both in February and October 2015);
 - b) Little Tikes toy set;

- c) Broil King Barbecue;
- d) Disney's Frozen Battery-Operated Ride-On SUV; and
- e) KitchenAid Fridge;

6.4 Some of the items advertised by Respondent and charged to Group members at prices which Respondent ultimately failed to honor, appeared on the Respondent's website as follows:

I. Little Tikes toy set advertised and charged in January of 2015 at \$12.99:



12,99 \$

No d'article :
160 364 210 10

Qté: 1



**AJOUTER
AU PANIER**



II. Broil King Barbecue advertised and charged in April of 2015 at \$69.99:

Expédition gratuite avec tout achat de 99 \$ ou plus. [Détails](#)

Englis

Sears Offres et circulaires Catalogues Listes cadeaux/souhaits Magasins Centre d'aubaines Service clientèle Une session

Tous nos rayons Recherche par mot-clé, catégorie, marque ou No d'article  

Réclame Nous payons les taxes! Épargnez 15 % sur certains articles à prix de solde à prix de solde et à prix ordinaire. Du 2 au 6 avril 2015. [Dét](#)

Sears.ca > Extérieur et jardin > Barbecues > Barbecues au propane > Broil King(MD) Barbecue Regal 590 pro au propane

Broil King(MD) Barbecue Regal 590 pro au propane

★★★★★
Écrire un avis
Poser une question

 **J'aime** Soyez le premier de vos amis à indiquer que vous aimez ça.

La série Regal(MC) de Broil KingMD présente un design élégant et contemporain, tout en vous offrant les résultats de cuisson légendaires que vous êtes en droit d'attendre d'un

[Voir plus](#)

 **Nouveautés**

L'assistance Est Toujours Disponible Au 1 888 932-1015



69,99 \$
Épargnez 1050,00 \$
Sears Prix Ordinaire: 1119,99 \$
maintenant 69,99 \$ jusqu'au 6 avril 2015

En stock

QTÉ: [Ajouter au panier](#)

[ajouter à la liste de cadeaux](#) | [ajoutez à la liste d'articles souhaités](#)

GARANTIE DE PARITÉ DES PRIX

III. Mattress advertised and charged in February and October of 2015 at \$150.00 and \$135.00:

Expédition gratuite avec tout achat de 99 \$ ou plus. [Détails](#)

English

Sears Offres et promotions Catalogues Listes cadeaux/souhaits Magasins Centre d'aubaines Service clientèle Une session

Tous nos rayons Recherche par mot-clé, catégorie, marque ou No d'article  

Aujourd'hui ÉPARGNEZ 70 % sur une grande couette 2 places en duvet Pacific Coast™ 119,99 \$. Et encore plus de bonnes affaires. [Magasins](#)

Sears.ca > Matelas > Ensembles matelas-somier > Simmons(MD) Beautyrest(MD) Ensemble à plateau standard 'Halifax' - g 2 places/tg 2 places

Simmons(MD) Beautyrest(MD) Ensemble à plateau standard 'Halifax' - g 2 places/tg 2 places

★★★★★
Écrire un avis
Poser une question

 **J'aime** Soyez le premier de vos amis à indiquer que vous aimez ça.

- EXCLUSIVITÉ CATALOGUE/SEARS.CA
- matelas 9 po haut
- support ferme

[Voir plus](#)

L'assistance Est Toujours Disponible Au
1 888 932-1015

Information Sur L'expédition Et La Livraison

Retours Faciles

Options De Ramassage

Options De Financement

Information Sur Les Matelas



150,00 \$

Choisissez une taille
 G 2 places Tg 2 places

sort inclus dans cet ensemble

En stock

QTE: [Ajouter au panier](#)

[ajouter à la liste de cadeaux](#)
[ajoutez à la liste d'articles souhaités](#)

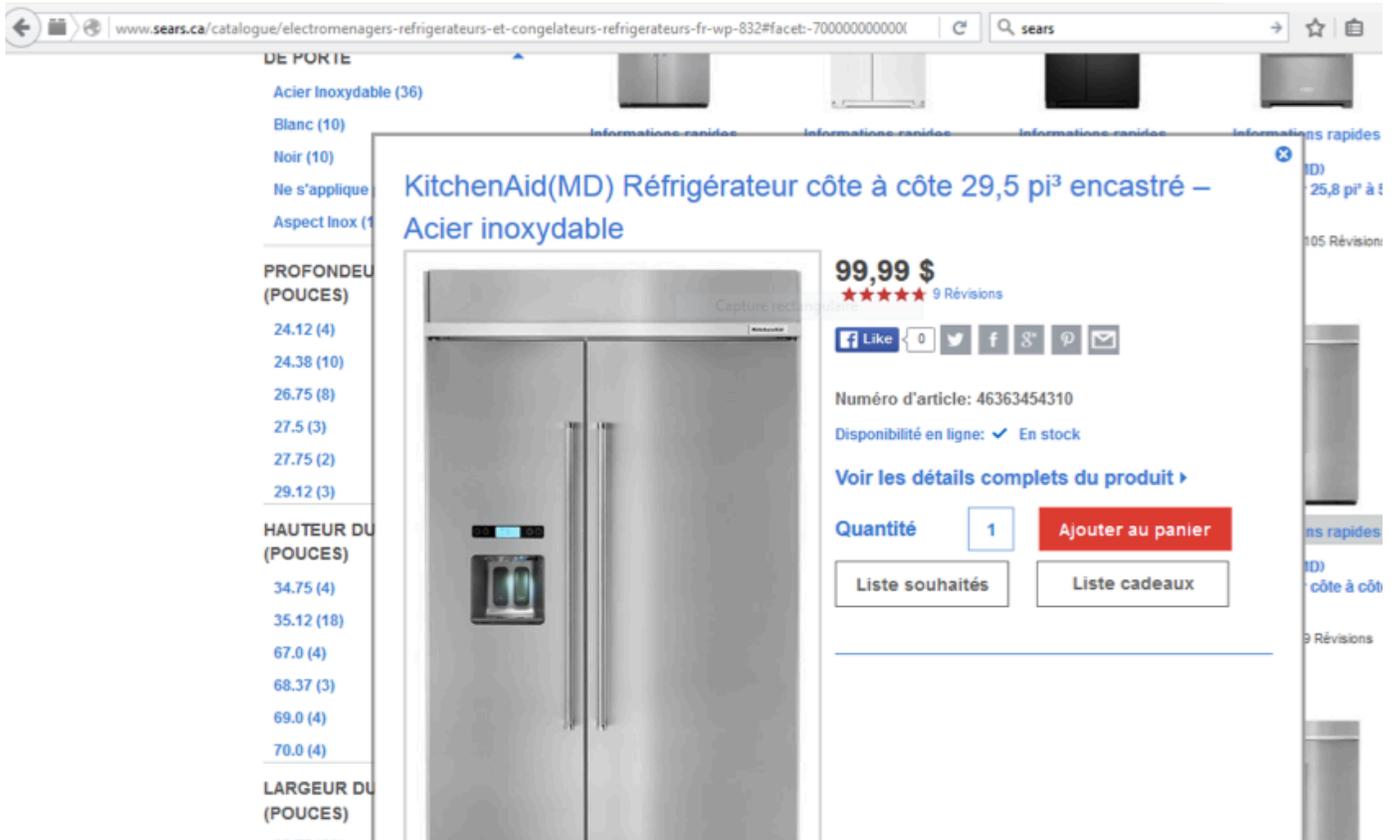
**365
NUITS**

LA MEILLEURE GARANTIE
DE CONFORT AU CANADA

[Détails](#)

Numéro de l'article: 01365784310

IV. KitchenAid Fridge advertised and charged in January of 2016 at \$99.99:



6.5 Sears is a repeat offender;

6.6 As a repeat offender, even if Sears did in fact make a mistake, such a mistake must be characterized as inexcusable, since the repetition of the mistake on the advertised price (including **before and after** the Motion to authorize a class was originally served) demonstrates gross negligence on the part of the Respondent;

7. Quebec consumer law is a matter of protective public order;

8. It is unlawful for Respondent to derogate from the provisions of the CPA in its Terms and Conditions, Petitioner disclosing as **Exhibit P-1** a copy of the Terms and Conditions as they appear on the Sears Canada website (www.sears.ca);

8.1 Respondent unlawfully operates in the province of Quebec by derogating from the CPA by private agreement or by invoking its own policies, as it appears from its communications to Group members, Petitioner disclosing **Exhibit P-5**:

Please be advised that **your order was cancelled due to pricing error on the items**. The price of the item is \$715.95. But, you were only charged for \$135.00 for each items.

As explained below **in our policy, we are unable to honour this price as it was a website pricing error**.

“Errors, Inaccuracies or Omissions”

Sears makes every effort to ensure that the Content on this Internet Site is complete and current. However, Sears does not guarantee that the information contained on this Internet Site will not contain errors, inaccuracies or omissions. Such errors, inaccuracies or omissions may relate to price or to product description or availability. Sears reserves the right to correct any error, inaccuracy or omission or to change or update the Content without prior notice to you. Further, Sears reserves the right to refuse or cancel any orders containing any error, inaccuracy or omission, whether or not the order has been submitted, confirmed and/or your credit card has been charged. If your credit card has been charged for the purchase and your order is cancelled, Sears shall promptly issue a credit to your credit card.

[**Emphasis added in bold**].

- 8.2 For instance, in a recently publicized incident, the Respondent allegedly sold over 25,000 units of a Little Tikes children’s play set at the Advertised Price of \$12.99, but subsequently cancelled all Consumer Purchases because, as Respondent plead, a pricing error occurred and the play set should have been listed for \$129.99 instead of \$12.99, as it appears from a copy of the CJAD news article on August 12, 2015, Petitioner disclosing **Exhibit P-6**;
- 8.3 By proceeding in this manner, Respondent engages in false/misleading advertising and forces Group members to pay a higher price than the one it advertises for its goods, should Group members still wish to acquire the goods after their Purchase was cancelled by Sears;
9. By reason of Respondent’s unlawful conduct, the Petitioner and the members of the Group have suffered a prejudice, which they wish to claim, every time a Group member or consumer made a Purchase which the Respondent unilaterally cancelled, especially after sending a confirmation order to Group members after each purchase;
- 9.1 Group members in Quebec benefit from an **absolute presumption of prejudice** and the prohibited practice is deemed to have had a fraudulent effect on Group members because:

- a) Sears failed to fulfil one of the obligations imposed by Title II of the CPA (section 219 and paragraph c of section 224);
- b) all Group members saw the representation (the price offered by Sears) that constituted a prohibited practice;
- c) the Group members' seeing of that representation resulted in the formation of a consumer contract (a distance contract in this case); and
- d) a sufficient nexus existed between the content of the representation (the price offered and item description) and the goods or services covered by the contract (the prohibited practice was capable of influencing the behaviour of Group members with respect to the formation of the contract);

B) THE PARTIES

- 10. The Petitioner is a consumer within the meaning of the CPA, as well as within the consumer protection and trade practice legislation in other Canadian jurisdictions;
- 11. The Respondent, Sears Canada Inc., is carrying on the business of sales in department stores and by catalogue, as it appears from an extract of the enterprise's information statement from the enterprise register (CIDREQ), Petitioner disclosing **Exhibit P-2**;
- 11.1 Respondent also operates the website <http://www.sears.ca>, where it enters into distance contracts with consumers;
- 12. The Respondent is a merchant within the meaning of the CPA, or "suppliers" under the consumer protection and trade practice legislation in other Canadian jurisdictions, and their activities are governed by these legislation, among others;

II. FACTS GIVING RISE TO THE PETITIONER'S CLAIM

- 13. On **October 1st, 2015**, Petitioner purchased one (1) King Size mattress (item #013595618), Festival model (hereinafter the "**Mattress**"), from the Respondent's website: <http://www.sears.ca/product/wholehome-md-festival-foam-mattress/601-000011593-57760>;

i. Circumstances of Petitioner's Purchase

- 13.1 Petitioner was interested in this Mattress because he saw it advertised on the Sears website at an excellent price and because the current mattress that he and his wife had was almost 12 years old;

- 13.2 Seeing that the Mattress was offered by Sears at \$135.00 plus taxes, and seeing that he needed a new mattress, Petitioner decided to accept the Respondent's offer and purchase one mattress;
- 13.3 Petitioner also informed a few of his friends about the Respondent's offer, who also purchased the same Mattress;
14. Petitioner accepted the offer made by Sears on said website and then paid Sears the price it advertised of \$135.00 plus applicable taxes for one (1) Mattress, upon which Petitioner received an e-mail confirmation of the order from Sears saying that the mattress was "In Stock" and was expected to be received by October 10th, 2015, Petitioner disclosing as Exhibit P-3 a copy of the proof of purchase and order confirmation from the Respondent dated October 1st, 2015;
- 14.1 On October 5th, 2015, Sears Canada charged the Petitioner's Visa credit card in the amount of \$155.22, which corresponds to the total amount of his purchase appearing on his confirmation order, Exhibit P-3, as it appears from an excerpt of his Visa statement below:

01 OCT 05 OCT SEARS CANADA DIRECT 1 800 2673277ON 155,22 \$
74064495276920121230342

ii. Cancellation of Petitioner's Order

15. The regular price of said Mattress was listed at \$1599.99 plus applicable taxes;
- 15.1 On October 6th, 2015, Respondent's customer service agent left a voice message on Petitioner's voicemail stating as follows:
- "This is Ellen from Sears Customer Service. This message is for Mr. Leon Berros. We would like to inform you that the king size mattress was already cancelled due to the pricing error..."*
16. On **October 8th, 2015**, (being **one week after** his Purchase), Respondent cancelled the Petitioner's Mattress purchase, Petitioner disclosing as **Exhibit P-4** a copy of the email sent to him by Respondent which includes the following:

Hello Leon Berros,

There has been a change in the status of your followings Sears order. Only the items for which a change has occurred are listed.

Order Date: Oct 01 2015		
Order #: 0803119470		
Method of Payment: VISA Card		
Pick Up Location:		
Lasalle		
(514)364-7310		
GD -SEARS MAGASIN		
7071 NEWMAN BOUL		

Item#	Description	
013595618	KN MAT,FESTIVAL	
Qty	Price	Status
1	135.00	Unavailable

- 16.1 In its email sent to Petitioner on October 8th, 2015, Exhibit P-4, Sears claims that the “**Status**” of the mattress is “**Unavailable**”, which is false;
- 16.2 The reality is that the mattress was no longer available for the price Petitioner legally purchased it at;
17. **On October 10th, 2015**, instead of sending Petitioner a mattress as it initially promised to deliver by that date, Respondent sent Petitioner a gift card in the amount of \$25.00, accompanied by a letter stating:

Dear Mr Berros:

Thank you for taking the time to contact us. Your comments are appreciated.

We would like to sincerely apologize for the inconvenience you’ve experienced with your order.

At Sears, we value our customers and strive to make Sears a “Great Place to Shop”. We are always very concerned when something happens to the contrary. Please be assured that this concern is being given special attention.

We would like you to accept the enclosed \$25.00 in Corporate Sears Gift cards to be used towards your future Sears purchases...

18. Petitioner did not accept the \$25.00 gift card and returned it back to the Respondent, along with a copy of its letter dated October 10th, 2015;

19. By proceeding in this manner, the Respondent unlawfully attempts to charge Consumers a higher price than the one it advertises for its goods or services;
- 19.1 The Respondent didn't sell the Mattress to Petitioner at the Advertised Price of \$135.00 plus taxes, but it instead interested the Petitioner into purchasing something else from Sears by offering him a \$25.00 rebate towards his future purchases at Sears;
20. The Respondent's conduct constitutes prohibited business practices as defined in sections 215, 219 and paragraph c of section 224 of the *CPA*;
21. Moreover, the Respondent fails to fulfill the general obligations imposed on it under sections 10 and 16 of the *CPA*;
- 21.1 Consequently, Respondent is liable to reimburse Petitioner the following amounts, inclusive of sales taxes:
- | | |
|---|-------------------|
| -Value of Mattress (\$1839.59) minus price advertised/charged (\$155.22): | \$1,684.37 |
| -Amount on account of punitive damages (section 272 <i>CPA</i>): | \$300.00 |
| | ----- |
| Total: | \$1,984.37 |

III. DAMAGES

22. During the class period Respondent has advertised and offered at least 5 different items for sale (the Little Tikes toy set, the Broil King Barbecue, Disney's Frozen Battery-Operated Ride-On SUV, the KitchenAid Fridge and the Mattress on at least two occasions), and then defaulted on its obligation to deliver the items sold to Group members, and this in violation of the law in Quebec as well as in other Canadian provinces;
- 22.1 Respondent's misconduct is to the detriment of vulnerable Canadian consumers, who rightfully presume that a product has gone through a serious price verification process before being offered for sale by Respondent on its website to millions of people across Canada;
- 22.2 Consequently, the Respondent has breached several obligations imposed on it by consumer protection and trade practice legislation in Quebec and other Canadian provinces, including:
- a) Quebec's *CPA*, including sections 10, 16, 215, 219 and 224(c), thus rendering sections 253 and/or 272 applicable;
 - b) Alberta's *Fair Trading Act*, RSA 2000, c F-2, including sections 6, 7 and 13;

- c) Saskatchewan's *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, including sections 6-9 and 93;
- d) Manitoba's *The Business Practices Act*, CCSM c B120, including sections 2, 3 and 23;
- e) British Columbia's *Business Practices and Consumer Protection Act*, SBC 2004, c 2, including sections 4-10;
- f) Ontario's *Consumer Protection Act*, 2002, SO 2002, c 30, Schedule A, including sections 11 and 14;
- g) Prince Edward Island's *Business Practices Act*, RSPEI 1988, c B-7, including sections 2-4;
- h) Newfoundland and Labrador's *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, including sections 7-10;

22.3 Moreover, Respondent violated section 52 of the *Competition Act* by recklessly making representations to the public that were false or misleading in a material respect, while promoting the supply of its products;

22.4 In light of the foregoing and due to Respondent's failure to deliver the items sold, the following damages may be claimed against the Respondent:

- a) Reimbursement of the value Group members unlawfully lost, being the difference between the replacement cost and the Advertised Price (hereinafter the "**Lost Value**");
- b) Punitive damages, in the amount of \$300.00 per Group member, for the breach of obligations imposed on the Respondent pursuant to section 272 CPA, as well as of the consumer protection and trade practice legislation in the other Canadian provinces;

Basis of claim for punitive damages (s. 224(c) and 272 CPA)

22.5 Group members were justified in presuming that the products advertised by Sears, including those pictured above, have gone through a serious price verification process, prior to being offered for sale by Respondent;

22.6 Group members were disappointed after learning that Respondent would not honour the price it advertised and contracted at. One Group member even created a Facebook page, where other Group members voice displeasure with Sears concerning the issue in dispute, which has attracted over 2,200 "likes";

- 22.7 Respondent had a legal obligation to honour the price it advertised and contracted for, but instead was more concerned about its bottom line than about honouring its contractual and legal obligations;
- 22.8 This lack of accountability on the part of Sears is in and of itself an important reason for this Court to enforce measures that will punish Sears, as well as deter and dissuade them, and other entities, from engaging in similar undesirable conduct to the detriment of Quebec and Canadian consumers;
- 22.9 The punitive damages provided for in section 272 CPA have a preventive objective, that is, to discourage the repetition of such undesirable conduct;
- 22.10 Considering the whole of Sears' misconduct at the time of and after the violations, the record shows that Sears:
- a) was negligent in the pricing of its Little Tikes toy set as early as January 2015;
 - b) was careless by not reacting earlier to the so-called "pricing errors" (some customers actually received the Little Tikes toy set from Sears for \$12.99) ;
 - c) was negligent by not putting measures in place: (i) after the ordeal involving the Little Tikes toy set in **January 2015**; (ii) after the "pricing errors" in **February 2015** (the Simmons mattress); (iii) after **April 2015** (the BK Barbecue); (iv) again in **October 2015** (Petitioner's mattress); and (v) even after the original filing of this class action, when it listed the Kitchen Aid Fridges for \$99.99 in **January 2016**;
 - d) displays disregard to its obligations and consumers' rights under the CPA and other consumer protection and trade practice legislation in Canada;
- 22.11 In these circumstances, Petitioner's claim for punitive damages is justified;

IV. THE GROUP

23. The Group for whom the Petitioner intends to act is described in the first paragraph of this Motion and includes any person in Canada (subsidiarily Quebec), who, since October 13th, 2012, ordered or purchased any goods or services from Sears by internet, by phone, by catalogue, and/or in-store and who, after receiving a confirmation of their Purchase from Sears at the price which it initially advertised, subsequently had their Purchase cancelled by Sears, who did not respect its Advertised Price;

V. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

24. The claims of every member of the Group are founded on very similar facts to the Petitioner's claim;
- 24.1 Group members were attracted to Sears' website by false and misleading representations within the meaning of section 219 of the CPA (as well as the other consumer protection legislation in Canada and the Competition Act);
- 24.2 Sears failed in its obligation to honour all Group members' Purchases at its Advertised Price;
- 24.3 The prohibited practices committed by Sears was virtually identical vis-a-vis each Group member (the only variable being the item purchased);
- 24.4 The damages sustained by the Group members flow, in each instance, from a common nucleus of operative facts, which can be summarized as follows:
 - a) Group member is attracted to Sears by a false and misleading representation;
 - b) Group member purchases an item from Sears at the false and misleading price;
 - c) Group member's order is confirmed via a confirmation email sent by Sears;
 - d) Group member's credit card is charged by Sears;
 - e) Group member is later informed by Sears (either by phone, email, or both) that their Purchase will not be honoured (Sears will not deliver the items sold at the price which it advertised and charged);
 - f) Group member's credit card is refunded;
25. Every member of the Group purchased a good or service from the Respondent, only to subsequently have their Purchase cancelled, allegedly due to a pricing error;
26. Consequently, each member of the Group lost value as a result of the Respondent's failure to fulfill its contractual obligations;
27. Every member of the Group has suffered damages equivalent to the difference between the cost of repurchasing a "cancelled" product and the Advertised Price of the "cancelled" product;
28. All of the damages to the Group members are a direct and proximate result of the

Respondent's misconduct;

29. The questions of fact and law raised and the recourse sought by this Motion are identical with respect to each member of the Group;
30. In taking the foregoing into account, all members of the Group are justified in claiming the sums which represent the Lost Value, as well as punitive damages;

VI. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

1) The composition of the group:

31. The composition of the Group makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
32. Petitioner is unaware of the total number of the Respondent's clients who had their Purchases unilaterally cancelled by Respondent due to a pricing error;
- 32.1 On February 19th, 2015, shortly after the Little Tykes toy set fiasco, Option Consommateurs issued a press release on its website (http://www.option-consommateurs.org/salle_presse/communiques/464/) stating as follows:

Option consommateurs dépose une plainte à l'Office de la protection du consommateur à la suite du **refus de Sears Canada d'honorer les commandes** placées via son site internet ou par téléphone **à la suite d'une erreur de prix**. Au cours de la dernière semaine, **plus de 1 500 consommateurs ont contacté Option consommateurs** par téléphone ou par courriel pour dénoncer l'annulation de leur commande.

[emphasis in bold].

33. The number of persons included in the Group is estimated to be in the tens of thousands;
34. The names and addresses of all persons included in the Group are not known to the Petitioner, however, are in the possession of the Respondent;
35. Group members are very numerous and are dispersed across the province, country and elsewhere;
- 35.1 These facts demonstrate that it would be impractical, if not impossible, to contact each and every Group member to obtain mandates and to join them in one action;

36. In these circumstances, a class action is the only appropriate procedure for all of the members of the Group to effectively pursue their respective rights and have access to justice without overburdening the court system;

2) The claims of the members of the Group raise identical, similar or related issues of law or fact:

37. The recourses of the Group members raise identical, similar or related questions of fact or law, namely:

- a) Does Sears' publicity, on the item purchase page, constitute an offer comprising all the essential elements of the intended contract (and this even if Sears indicates in its Terms and Conditions that it is not willing to be bound in the event of the consumer's acceptance)?
- b) If so, is Sears deemed to have made an offer to enter into a contract pursuant to section 54.1 CPA?
- c) Is a consumer contract entered into upon the consumer's acceptance of the price offered by Sears and, if so, must Sears honor the terms of said contract?
- d) Can the Respondent contractually liberate itself from the consequences of its own act or the act of its representatives?
- e) Did Sears in fact make a mistake in the advertised prices?
- f) Does the repetition of the mistake (at least 6 times within 12 months) in the advertised prices demonstrate gross negligence on the part of Sears?
- g) If so, should Sears' mistake be characterized as inexcusable under article 1400, paragraph 2, C.C.Q?
- h) Did Sears have the principal obligation to deliver the goods or to perform the service stipulated in the contract?
- i) If so, what is the appropriate remedy where the Respondent fails to deliver the goods or perform the service stipulated in the contract in these circumstances?
- j) Did Sears commit a prohibited business practice as defined by section 219 CPA?
- k) Did Sears violate paragraph c of section 224 CPA?
- l) Did Sears knowingly or recklessly make a representation to the public that was false or misleading in a material respect, in violation of section 52(1) of the

Competition Act and of the consumer protection and trade practice legislation in the other Canadian provinces?

- m) Did Group members unlawfully lose value as a result of the Respondent's failure?
 - n) Are the Group members entitled to compensatory damages and, if so, in what amount?
 - o) Are the Group members entitled to punitive damages and, if so, in what amount?
38. All Group members, regardless of the individual item they purchased (be it a mattress, a toy, a barbecue, etc.) have a common interest both in proving the commission of prohibited businesses practices by Sears and in maximizing the amount of the resulting Lost Value;
- 38.1 Any disparity between the actual item purchased by each Group member does not alter the fact that they have a collective interest in these questions of fault and liability;

VII. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

- 39. The action that the Petitioner wishes to institute on behalf of the members of the Group is an action in damages and declaratory judgment;
- 40. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT Plaintiff's action against Defendant;

DECLARE the Defendant liable for the damages suffered by the Plaintiff and each of the members of the Group;

CONDEMN the Defendant to pay Leon Berros the amount \$1984.37, itemized as follows:

<u>-Mattress Value (\$1839.59) less price advertised/charged (\$155.22):</u>	<u>\$1,684.37</u>
<u>-Amount on account of punitive damages (section 272 CPA):</u>	<u>\$300.00</u>

	Total: \$1,984.37

CONDEMN the Defendant to pay to the members of the Group an amount to be determined in compensatory damages, and **ORDER** collective recovery of these sums;

CONDEMN the Defendant to pay the sum of \$300.00 per transaction per Group member on account of punitive damages in accordance to section 272 CPA (and the consumer protection and trade practice legislation in other Canadian provinces, if applicable), and **ORDER** collective recovery of this sum;

CONDEMN the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Group members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this Honourable Court shall determine;

40.1 The interests of justice favour that this motion be granted in accordance with its conclusions;

VIII. THE PETITIONER REQUESTS THAT HE BE ATTRIBUTED THE STATUS OF REPRESENTATIVE PLAINTIFF

41. Petitioner is a member of the Group;
42. Petitioner is ready and available to manage and direct the present action in the interest of the members of the Group that he wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the Group, as well as to dedicate the time necessary for the present action and to collaborate with his attorneys;
43. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the Group;
44. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
45. Petitioner, with the assistance of his attorneys, is ready and available to dedicate the

time necessary for this action and to collaborate with other members of the Group and to keep them informed;

46. Petitioner is a general contractor in renovations who is disciplined, well-organized and determined to act as a leader for members of the Group;
- 46.1 Petitioner was extremely upset that his contract was unilaterally cancelled by Sears and dismayed by the way Sears handled the situation (including the offer of a \$25.00 gift card, when in reality Petitioner suffered lost value well in excess of that amount);
- 46.2 Following the cancellation of his purchase, Petitioner contacted the couple of friends he knew who had also made purchases online from Sears and discovered that their purchases were also cancelled in similar fashion;
- 46.3 Petitioner was flabbergasted to learn that a company of Sears' stature would conduct itself with complete disregard for consumers' rights;
- 46.4 As for identifying other Group members, the Petitioner drew certain inferences from the situation after learning about the CJAD article, Exhibit P-6, which reported that more than 25,000 Little Tikes Toy Sets were purchased and subsequently cancelled in the exact same manner as in his case with the Mattress. Petitioner realizes that by all accounts, there is an important number of consumers that find themselves in an identical situation, and that it wouldn't be useful for him to attempt to identify them given their sheer number;
- 46.5 Petitioner wants to lend his voice and help others in the same situation. In fact, Petitioner has been active in a Facebook Group called "Maman Sears Deal" which has received over **2,282 "likes"** to date. The "Maman Sears Deal" is a social group online, where victims of Sears' prohibited business practices specifically mentioned herein share their respective experiences and try to find efficient ways to be compensated for their losses. Petitioner has posted his story in the Group and the original Motion to authorize has been shared publicly on the "Maman Sears Group" for all 2,282 "fans" to view;
- 46.6 Petitioner further lent his voice to Group members by taking the time to answer questions during an interview with the *Journal de Montréal* and the *Journal de Québec* (who have been actively covering these prohibited practices committed by Sears since January 2015), as it appears from the April 16th, 2016, news article published online: <http://www.journaldequebec.com/2016/04/16/demande-de-recours-collectif-contre-sears>;
47. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other Group members, recognized and protected so that they may be compensated for the damages that they have suffered as a

consequence of the Respondent's conduct;

48. Petitioner understands the nature of the action;
49. Petitioner's interests are not antagonistic to those of other members of the Group;

IX. JURISDICTION

50. The Petitioner suggests that this class action be exercised before the Superior Court in the district of Montreal for the following reasons:
 - a) A great number of the members of the Group, including the Petitioner, reside in the judicial district of Montreal;
 - b) Respondent conducts business and operates several large department stores in the District of Montreal;
 - c) The Petitioner's attorneys practice their profession in the judicial district of Montreal;
 - d) The consumer contract between the Petitioner and Sears is deemed to be entered into at the address of the Petitioner, in the judicial district of Montreal;
 - e) There exists a real and substantial connection between the province of Quebec and the damages suffered by Petitioner and Group members;

X. NATIONAL CLASS (SUBSIDIARILY A PROVINCIAL CLASS)

- 50.1 Petitioner wishes to represent a national class (subsidiarily a provincial class), for the following reasons:
 - a) A multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgments on questions of fact and law that are similar or related to all members of the Group;
 - b) In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against Sears. Even if the Group members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by Sears' misconduct would increase delays and expenses to all parties and to the court system;

- c) The facts and legal issues of the present action support a proportional approach to class action standing that economizes judicial resources and enhances access to justice;
- d) A search on the National Class Action Registry confirms that no other class actions have been instituted to date against Sears in any other Canadian province on behalf of the Group members (for similar or related matters);
- e) The principal purposes of most class actions for damages are: (i) compensation for victims; (ii) efficiency for victims; and (iii) the enhanced deterrence arising from the availability of class actions. If this Court authorizes a national class, Sears would ultimately face liability towards *all* victims of their misconduct, which would deter Sears and others from engaging in similar reprehensible conduct;
- f) Under section 36 of the *Competition Act*, private parties can commence legal action in the Federal Court or in a provincial court of superior jurisdiction to recover losses or damages incurred as a result of conduct contrary to section 52 of the *Competition Act*. Considering that the *Competition Act* is a federal legislation that is in force across Canada, any decision by the Superior Court of Quebec concerning section 52 of the *Competition Act* could apply uniformly across Canada, should a national class be authorized;

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

APPOINT the Petitioner the status of representative of the persons included in the Group herein described as:

All persons in Canada (subsidiarily Quebec) who, since October 13th, 2012, ordered or purchased any goods or services from the Respondent by internet, by phone, by catalogue, and/or in-store (hereinafter the “Purchase”), and who, after receiving a confirmation of their Purchase from the Respondent at the price which it initially advertised, subsequently had their Purchase cancelled by the Respondent, who did not respect the price it initially advertised.

or any other group to be determined by the Court.

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Does Sears' publicity, on the item purchase page, constitute an offer comprising all the essential elements of the intended contract (even if Sears indicates in its Terms and Conditions that it is not willing to be bound in the event of the consumer's acceptance)?
- b) If so, is Sears deemed to have made an offer to enter into a contract pursuant to section 54.1 CPA?
- c) Is a consumer contract entered into upon the consumer's acceptance of the price offered by Sears and, if so, must Sears honor the terms of said contract?
- d) Can the Respondent contractually liberate itself from the consequences of its own act or the act of its representatives?
- e) Did Sears in fact make a mistake in the advertised prices?
- f) Does the repetition of the mistake (at least 6 times within 12 months) in the advertised prices demonstrate gross negligence on the part of Sears?
- g) If so, should Sears' mistake be characterized as inexcusable under article 1400, paragraph 2, C.C.Q?
- h) Did Sears have the principal obligation to deliver the goods or to perform the service stipulated in the contract?
- i) If so, what is the appropriate remedy where the Respondent fails to deliver the goods or perform the service stipulated in the contract in these circumstances?
- j) Did Sears commit a prohibited business practice as defined by section 219 CPA?
- k) Did Sears violate paragraph c of section 224 CPA?
- l) Did Sears knowingly or recklessly make a representation to the public that was false or misleading in a material respect, in violation of section 52(1) of the Competition Act and of the consumer protection and trade practice legislation in the other Canadian provinces?
- m) Did Group members unlawfully lose value as a result of the Respondent's failure?

- n) Are the Group members entitled to compensatory damages and, if so, in what amount?
- o) Are the Group members entitled to punitive damages and, if so, in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT Plaintiff's action against Defendant;

DECLARE the Defendant liable for the damages suffered by the Plaintiff and each of the members of the Group;

CONDEMN the Defendant to pay Leon Berros the amount \$1984.37, itemized as follows:

-Mattress value (\$1839.59) less price advertised/charged (\$155.22):	<u>\$1,684.37</u>
-Amount on account of punitive damages (section 272 CPA):	<u>\$300.00</u>

	Total: <u>\$1,984.37</u>

CONDEMN the Defendant to pay to the members of the Group an amount to be determined in compensatory damages, and **ORDER** collective recovery of these sums;

CONDEMN the Defendant to pay the sum of \$300.00 per transaction per Group member on account of punitive damages in accordance to section 272 CPA (and the consumer protection and trade practice legislation in other Canadian provinces, if applicable), and **ORDER** collective recovery of this sum;

CONDEMN the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Group members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount

of the collective recovery orders;

RENDER any other order that this Honourable Court shall determine;

DECLARE that all members of the Group that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Group that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the Group in accordance with article 579 C.C.P. within sixty (60) days from the judgement to be rendered herein in the “News” sections of the Saturday editions of LA PRESSE, the NATIONAL POST and the MONTREAL GAZETTE;

ORDER that said notice be published on the Respondent’s website, Facebook pages and Twitter accounts, in a conspicuous place, with a link stating “Notice to Consumers who Purchased Goods or Services from Sears and whose Order was Cancelled due to a Pricing Error”;

ORDER the Respondent to send an Abbreviated Notice by e-mail to each Group member, to their last known e-mail address, with the subject line “Notice of a Class Action”;

RENDER any other order that this Honourable Court shall determine;

THE WHOLE with costs including publications fees.

Montréal, June 30th, 2016



SIMON ET ASSOCIÉS

Attorneys for Petitioner

N° : 500-06-000769-154

**(Class Action)
SUPERIOR COURT
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

LEON BERROS

Petitioner

vs.

SEARS CANADA, INC.

Respondent

**AMENDED MOTION TO AUTHORIZE
THE BRINGING OF A CLASS ACTION
AND TO APPOINT THE STATUS OF
REPRESENTATIVE
(ARTICLE 571 AND FOLLOWING C.C.P.)**

ORIGINAL

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