UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GARY CAUDILL, SYLVESTOR J. DEROSA, STEVEN D. FORD, SR., JAMES HILTON, DAVID MCKILLOP, DONALD MURPHY, SUZANNE J. NOVAK, AND GREGORY TILL, on behalf of themselves and those similarly situated,

Plaintiffs,

-vs-

SEARS TRANSITION PAY PLAN, as amended and restated January 1, 2004, SEARS ROEBUCK AND CO., SEARS HOME IMPROVEMENT PRODUCTS, INC. and SEARS HOLDINGS CORPORATION, as Plan Administrators and Employers, jointly and severally.

Defendants.

Case No.

Hon.
Mag. Judge

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COMPLAINT
(CLASS ACTION)

I. INTRODUCTION

1. This is a proposed class action to vindicate the rights of former employees of Defendant SEARS, ROEBUCK AND CO. under the Employee Retirement Income Security Act of 1974, as amended 29 U.S.C. §1001 *et seq* (hereinafter "ERISA").

2. Defendant SEARS HOLDINGS CORPORATION, through its predecessor

and wholly owned subsidiary, Defendant SEARS, ROEBUCK AND CO., offers installed home improvement products and services to the public for purchase, including heating, ventilation and air conditioning ("HVAC") products and installation services.

3. Defendant SEARS, ROEBUCK AND CO. employed approximately five hundred and fifty HVAC Sales Associates nationwide. HVAC Sales Associates worked from their homes on a commission basis. HVAC Sales Associates received "leads" from their respective home offices. HVAC Sales Associates were reimbursed for their business expenses, including mobile telephone use, mileage, etc. They received paid holiday, vacation and personal time using their "benefit rate," an hourly amount that changed quarterly dependent upon past commissions earned.

4. Defendant SEARS, ROEBUCK AND CO. acquired other home improvement companies and combined some of them, in 2001, into a wholly owned subsidiary: Defendant SEARS HOME IMPROVEMENT PRODUCTS (hereinafter "Defendant SHIP" or "SHIP").

5. To increase their profit margin, Defendant SEARS, ROEBUCK AND CO. sought a way to substantially reduce the amount of compensation paid to its HVAC Sales Associates.

6. In 2004, Defendant SEARS, ROEBUCK AND CO., announced to its employees who worked as HVAC Sales Associates that their employment would be "transitioned" to SHIP, effective various dates dependent upon the Sales Associate's region. The Sales Associates were advised that their former department would no longer exist and that they would become employees of Defendant SHIP. By virtue of the "transition" Defendant SEARS, ROEBUCK AND CO. employees were terminated and

hired by Defendant SHIP.

7. Dramatic changes in HVAC Sales Associates' compensation occurred as a result of the "transition:" Approximately two hundred and eighty eight hours of paid time off per year was lost and business expenses were no longer to be reimbursed. Moreover, based upon the SHIP business model, HVAC Sales Associates were required to be available more days and more hours and to travel greater distances for sales calls.

8. Far greater responsibilities were imposed upon the HVAC Sales Associates, all for less compensation. The benefit of the "transition" ran to SHIP – a wholly owned subsidiary of Defendant SEARS, ROEBUCK AND CO., and now Defendant SEARS HOLDINGS CORPORATION.

9. Defendant SEARS TRANSITION PAY PLAN, as amended and restated January 1, 2004 (hereinafter "Defendant TPP" or "TPP") provides severance pay for employees whose employment is involuntarily terminated due to a unit closing, reorganization, job elimination or permanent layoff.

10. Full time hourly associates terminated due to a unit closing, reorganization, job elimination or permanent layoffs were eligible under defined conditions. Benefits to be paid under the TPP included one week of pay for each completed year of service with a minimum of four weeks pay. TPP benefits would not be paid to those offered a comparable position as defined by the plan.

11. The TPP was amended just prior to the first transition of HVAC Sales Associates to SHIP to deal specifically with the "integration" of HVAC to SHIP. A "comparable" job was defined as one "utilizing current skills" that 1) does not involve a

decrease in annual earnings potential of more than ten per cent and 2) is within a reasonable commuting distance (thirty miles if commute is daily or the equivalent if less frequently than daily, e.g. one hundred and fifty miles if the commute is weekly) of the associate's home.

12. The SHIP position was clearly not comparable to the Sears, Roebuck and Co. position. Not only were there dramatic changes in the business model, territories, products sold, the commission structure and the lead system, the SHIP position did not provide expense reimbursement or paid vacation, personal days or holidays. Most Sears HVAC Sales Associates received two hundred and eighty eight hours of vacation and paid time off -- over thirteen per cent of their compensation. Therefore, the deletion of paid vacation, personal days and holidays alone represents a decrease of compensation by more than ten per cent.

13. Misrepresentations regarding the plan language discouraged some of the HVAC Sales Associates from applying for benefits. However, many HVAC Sales Associates requested TPP benefits. Every one of them was denied, despite clear entitlement.

14. The plaintiffs named herein have brought this suit on behalf of themselves and the other approximately five hundred and fifty similarly situated former HVAC Sales Associates to vindicate their rights under ERISA – for full payment of their respective TPP benefits, interest and attorneys' fees.

II. JURISDICTION AND VENUE

15. This is a civil action over which original jurisdiction is vested in this Court by 28 U.S.C. §1331 (federal question jurisdiction).

16. Venue is appropriate in this Court under 28 U.S.C. §1391 as it is brought in a judicial district in which the defendants may be found at the time the action is commenced. Further, many of the plaintiffs and class members reside in the State of Michigan, including counties comprising the Eastern District of Michigan.

III. THE PARTIES

General Allegations Regarding the Plaintiffs

17. Defendant SEARS, ROEBUCK AND CO., as of January 2004, employed each one of the Plaintiffs in this action as an HVAC Sales Associate.

18. At all pertinent times, each of the plaintiffs in this action was an "employee" of Defendant SEARS, ROEBUCK AND CO. within the meaning 29 U.S.C. §1002(6), and a "participant" in and/or "beneficiary" of the TPP within the meaning of 29 U.S.C. §1002 (7) and (8).

19. Each of the plaintiffs in this action requested TPP benefits, were denied, appealed and were denied.

Specific Allegations Regarding the Plaintiffs

20. Plaintiff GARY CAUDILL is a resident of the State of Indiana who became employed by Defendant SEARS, ROEBUCK AND CO. in 1966. Plaintiff CAUDILL was employed in the Greater Cincinnati/Tri-State region as a HVAC Sales Associate beginning in 1985. In late 2004, Plaintiff CAUDILL was notified that his region would be "transitioned" to SHIP effective March 1, 2005.

21. On January 20, 2005, Plaintiff CAUDILL requested TPP benefits based upon the non-comparable nature of the SHIP position, a minimum decrease in earnings of more than thirteen per cent (five weeks of vacation and eleven paid holidays) and the

distance between his home and the home office (one hundred and thirty miles one way).

22. Plaintiff CAUDILL was denied TPP benefits. He appealed and was again denied.

23. Plaintiff SYLVESTER DEROSA is a resident of the State of New York who became employed by Defendant SEARS, ROEBUCK AND CO. in 1971. Plaintiff DEROSA was employed in the Western Suffolk County, Long Island region as a HVAC Sales Associate. In late 2004, Plaintiff DEROSA was notified that his region would be "transitioned" to SHIP effective April 16, 2005.

24. On January 11, 2005, Plaintiff DEROSA requested TPP benefits based upon the non-comparable nature of the SHIP position and a minimum decrease in earnings of more than thirteen per cent (five weeks of vacation and eleven paid holidays).

25. Plaintiff DEROSA was denied TPP benefits on March 21, 2005. He appealed and was again denied on June 17, 2005.

26. Plaintiff STEVEN D. FORD, SR. is a resident of the State of Michigan who became employed by Defendant SEARS, ROEBUCK AND CO. in 1986. Plaintiff FORD was employed in the Northeast Metro Detroit region as a HVAC Sales Associate. In late 2004, Plaintiff FORD was notified that his region would be "transitioned" to SHIP effective March 6, 2005.

27. On December 20, 2005, Plaintiff FORD requested TPP benefits based upon the non-comparable nature of the SHIP position and a minimum decrease in earnings of nearly twelve per cent (four weeks of vacation and eleven paid holidays).

28. Plaintiff FORD was denied TPP benefits on February 28, 2005. He appealed and was again denied July 11, 2005.

29. Plaintiff JAMES HILTON is a resident of the State of New Jersey who became employed by Defendant SEARS, ROEBUCK AND CO. in 1966. Plaintiff HILTON was employed in the New York region as a HVAC Sales Associate. In late 2004, Plaintiff HILTON was notified that his region would be "transitioned" to SHIP effective April 16, 2005.

30. On February 17, 2005, Plaintiff HILTON requested TPP benefits based upon the non-comparable nature of the SHIP position and a minimum decrease in earnings of more than thirteen per cent (five weeks of vacation and eleven paid holidays).

31. Plaintiff HILTON was denied TPP benefits on March 28, 2005. He appealed and was again denied on June 24, 2005.

32. Plaintiff DAVID MCKILLOP is a resident of the State of Michigan who became employed by Defendant SEARS, ROEBUCK AND CO. in 1964. Plaintiff MCKILLOP was employed in the Midwest Region, including the Detroit/Ann Arbor area, as a HVAC Sales Associate. In late 2004, Plaintiff MCKILLOP was notified that his region would be "transitioned" to SHIP effective March 1, 2005.

33. On December 1, 2004, Plaintiff MCKILLOP requested TPP benefits based upon the non-comparable nature of the SHIP position and a minimum decrease in earnings of more than thirteen per cent (five weeks of vacation and eleven paid holidays).

34. Plaintiff MCKILLOP was denied TPP benefits on December 21, 2004. He

appealed and was again denied on May 18, 2005.

35. Plaintiff DONALD MURPHY is a resident of the State of North Carolina who became employed by Defendant SEARS, ROEBUCK AND CO. in 1976. Plaintiff MURPHY was employed in the Washington D.C. Metro region, including southern Maryland and northern Virginia as a HVAC Sales Associate. In late 2004, Plaintiff MURPHY was notified that his region would be "transitioned" to SHIP effective February 1, 2005.

36. On January 10, 2005, Plaintiff MURPHY requested TPP benefits based upon the non-comparable nature of the SHIP position, a minimum decrease in earnings of more than thirteen per cent (five weeks of vacation and eleven paid holidays) and the distance between his home and the home office (thirty five and one half miles one way).

37. Plaintiff MURPHY was denied TPP benefits on March 16, 2005. He appealed and was again denied on July 22, 2005.

38. Plaintiff SUZANNE J. NOVAK is a resident of the State of Michigan who became employed by Defendant SEARS, ROEBUCK AND CO. in 1980. Plaintiff NOVAK was employed in the Metro Detroit region as a HVAC Sales Associate. In late 2004, Plaintiff NOVAK was notified that her region would be "transitioned" to SHIP effective March 1, 2005.

39. On December 1, 2004, Plaintiff NOVAK requested TPP benefits based upon the non-comparable nature of the SHIP position, a minimum decrease in earnings of more than thirteen per cent (five weeks of vacation and eleven paid holidays) and the distance between his home and the home office (forty miles one way).

40. Plaintiff NOVAK was denied TPP benefits on December 21, 2004. She

appealed and was again denied on June 3, 2005.

41. Plaintiff GREGORY TILL is a resident of the State of Michigan who became employed by Defendant SEARS, ROEBUCK AND CO. in 1965. Plaintiff TILL was employed in the Midwest Region, including the Detroit/Ann Arbor area as a HVAC Sales Associate. In late 2004, Plaintiff TILL was notified that his region would be "transitioned" to SHIP effective March 1, 2005.

42. On December 15, 2004, Plaintiff TILL requested TPP benefits based upon the non-comparable nature of the SHIP position and a minimum decrease in earnings of more than thirteen per cent (five weeks of vacation and eleven paid holidays).

43. Plaintiff TILL was denied TPP benefits on December 21, 2004 with supplemental information provided March 10, 2005. He appealed and was again denied on May 26, 2005.

Allegations Regarding the Defendants

44. Defendant SEARS TRANSITION PAY PLAN, as amended and restated January 1, 2004, (TPP) is an employee benefit plan as defined under ERISA, 29 U.S.C. §1002(1).

45. The TPP is self-funded.

46. Defendant SEARS, ROEBUCK AND CO. is incorporated in the State of New York and conducts business in each of the United States, including Michigan.

47. Defendant SHIP is a Pennsylvania corporation doing business throughout the United States, including Michigan.

48. Defendant SEARS HOLDINGS CORPORATION is a publicly traded Delaware corporation doing business throughout the United States, including the State

of Michigan.

49. Defendant SEARS, ROEBUCK AND CO. is the plan administrator of the TPP, pursuant to 29 U.S.C. §1002(16)(A)(i), and/or the plan sponsor, per 29 U.S.C. §1002(16)(B) and the employer of the HVAC Sales Associates, per 29 U.S.C. §1002(5) at the time they each became eligible for benefits under the TPP.

50. Upon information and belief, Defendant SEARS, ROEBUCK AND CO. delegated fiduciary and administrative responsibilities under the TPP to Defendant SHIP, rendering it a plan administrator and/or sponsor within the meaning of 29 U.S.C. §1002(16) and otherwise a fiduciary relative to the TPP.

51. Upon information and belief, Defendant SEARS, ROEBUCK AND CO. was acquired by and/or merged into Defendant SEARS HOLDINGS CORPORATION, which maintains and/or acquired control of Defendant SEARS, ROEBUCK AND CO. and Defendant SHIP and, consequently, the Defendant TPP.

52. Defendant SEARS HOLDINGS CORPORATION is a plan administrator per 29 U.S.C. §1002(16)(A)(i), and/or the plan sponsor, per 29 U.S.C. §1002(16)(B) and otherwise a fiduciary relative to the TPP.

IV. FACTUAL ALLEGATIONS

53. The Plaintiffs and similarly situated HVAC Sales Associates labored for the benefit of Defendant SEARS, ROEBUCK AND CO. for decades, building a substantial HVAC product and installation business.

54. As HVAC Sales Associates, the Plaintiffs and those similarly situated, worked from their homes selling HVAC products and installation services.

55. HVAC Sales Associates were expected to work a forty-hour workweek.

56. HVAC Sales Associates were paid on a commission-only basis, with the amount of commission tied to the product sold.

57. HVAC Sales Associates also received, as part of their compensation, paid time off: vacation (up to five weeks), personal days and paid holidays. Because there was no set hourly rate of pay for HVAC Sales Associates, their paid time off was calculated by an average of their commissions for the previous quarter, known as the "benefit rate."

58. HVAC Sales Associates were also eligible for sales promotions, including bonuses and prizes.

59. HVAC Sales Associates were provided benefits including medical, dental, disability and life insurance, and stock options.

60. HVAC Sales Associates were reimbursed the amounts they expended on behalf of their employer, including mileage, mobile telephone calls, postage, copies, etc.

61. Each HVAC Sales Associate was assigned a territory which was shared with a few other HVAC Sales Associates.

62. HVAC Sales Associates were encouraged to self-generate sales leads and were rewarded for doing so by way of increased commissions.

63. HVAC Sales Associates were also provided leads based upon equitable distribution within the assigned territories.

64. The HVAC Sales Associates followed the sale from start to finish: receiving the sales call, scheduling the appointment, writing the estimate, procuring contractors, obtaining credit approval, etc., culminating in a satisfied customer.

65. The HVAC Sales Associates were trained to be "counselor" sales

associates, working with the customers to fulfill their HVAC needs, often having multiple customer contacts prior to obtaining a sale. Consequently, the cancellation rate was extremely low.

66. The flexibility of the HVAC Sales Associate position attracted those with exceptional sales skills who excelled in an independent role. Well-matched employees continued in the position for decades.

67. Defendant SEARS, ROEBUCK AND CO. acquired various home improvement companies specializing in window installation, vinyl siding, kitchen remodels, etc. These companies were combined, in 2001, into a single corporation: Defendant SHIP, a wholly owned subsidiary of Defendant SEARS, ROEBUCK and CO.

68. Defendant SEARS, ROEBUCK AND CO. sought, in the months leading up to late 2004, a way to substantially reduce the compensation paid to its aging HVAC Sales Associate workforce, which was now largely eligible for five weeks of paid vacation per year and matching 401(k) contributions.

69. Carefully selecting only benefits not covered by ERISA, Defendant SEARS, ROEBUCK AND CO. determined, in conjunction with Defendant SHIP, exactly which benefits and forms of compensation could be eliminated.

70. In late 2004, only days before the very first transition was to take place, Defendant SEARS, ROEBUCK AND CO. announced that the HVAC Sales Associates would be "transitioned" to Defendant SHIP.

71. Essentially, this meant that each HVAC Sales Associate would be terminated from employment by Defendant SEARS, ROEBUCK AND CO. and hired by Defendant SHIP.

72. Defendant SEARS, ROEBUCK AND CO. would no longer employ HVAC Sales Associates.

73. There were stark differences in the HVAC Sales Associate's employment by Defendant SEARS, ROEBUCK AND CO. when compared to the SHIP positions.

74. SHIP Sales Associates were expected to be available for work seventy-two hours each week.

75. While SHIP Sales Associates are paid on a commission only basis, the commission amounts per product were to be controlled by Defendant SHIP and differed from the commissions established by Defendant SEARS, ROEBUCK AND CO.

76. Because Defendant SHIP priced many of the products higher, the ability to sell them was reduced and, therefore, the ability to earn the commissions was reduced.

77. Defendant SHIP would not provide any paid time off to former HVAC Sales Associates: no vacation, no personal days, no holidays.

78. The cost of doing business in terms of expenses, e.g. mileage, postage, telephone, etc., upon transition, would be hoisted squarely upon the Sales Associates, who would no longer be reimbursed for such expenses.

79. The sales territories to which the Sales Associates would be assigned at Defendant SHIP were dramatically larger compared to those with Defendant SEARS, ROEBUCK AND CO., (approximately five times larger) increasing the amount of travel required and thereby increasing un-reimbursed business expenses, decreasing the potential number of appointments an associate could complete in a day and thereby decreasing the number of potential sales.

80. Sales appointments would be made exclusively by Defendant SHIP at the

discretion of its managers.

81. The Defendant SHIP sales model is very different – focusing upon high pressure sales tactics, including a "one call close" rule. Sales Associates are required to make the sale on the first call to the customer or receive a substantially reduced commission or none at all.

82. These high-pressure sales tactics result in a higher average cancellation rate with Defendant SHIP.

83. As a result of the "transition," many HVAC Sales Associates with long tenure within the company were forced to consider retirement as an option.

84. Many HVAC Sales Associates, including the Plaintiffs, attempted to determine their eligibility for TPP benefits.

85. The TPP provides:

> Full-time hourly associates whose employment has been terminated due to a unit closing, reorganization, job elimination or permanent layoff may be eligible for Transition Pay Plan benefits.
>
> ***
>
> - If you are offered a comparable job, you are not eligible for Transition Pay Plan benefits, even if you don't accept the job.
>
> - If you are offered a non-comparable job, you may accept the job or Plan benefits, but not both.
>
> ***
>
> For eligible associates with one or more years of continuous service, the Transition Pay Plan includes:
>
> - Severance allowance equal to one week of pay for each completed year of service, with a minimum of 4 weeks pay, taken either as:
>   - a lump sum or
>   - salary continuation;
> - a leave of absence during the salary continuation period and, in some cases, beyond the end of salary continuation; and
> - eligibility for the retiree discount and retiree medical coverage (for those who meet the retiree medical plan's 10-year participation

requirement) for eligible associates who are at least 50 years of age with at least 10 years of continuous service.

***

... Your pay will be based upon the benefit rate that is in effect as of your last day worked.

86. The summary plan description contains a "Definitions" section that states:

A ***comparable job*** is one utilizing current skills that does not involve a decrease in annual earnings potential of more than 10% and is within a reasonable commuting distance (approximately 30 miles) of the closed or reorganized unit. A change in supervisory level or status is not a consideration in determining job comparability.

87. An amendment to the TPP, made effective October 15, 2004, was specifically designed to reach the HVAC to SHIP integration, stating in pertinent part:

... for purposes of this addendum, a comparable job is defined as one utilizing current skills that:

- Does not involve a decrease in annual earnings potential of more than 10% and
- Is within a reasonable commuting distance (approximately 30 miles if the commute is daily or the equivalent if less frequently than daily – e.g., 150 miles if the commute is weekly or 300 miles if the commute is every two weeks) of the associate's home.

88. Upon inquiry by HVAC Sales Associates, agents of Defendant SEARS, ROEBUCK AND CO. advised that TPP benefits would not be paid to HVAC Sales Associates upon "transition" to Defendant SHIP.

89. Many HVAC Sales Associates received misinformation, including documents of unknown origin that purport to interpret the plan to the detriment of the beneficiaries without reference to the actual plan language.

90. Agents of Defendant SEARS, ROEBUCK AND CO. failed to advise the TPP beneficiaries and participants that the "transition" from Defendant SEARS, ROEBUCK AND CO. to Defendant SHIP was an event that invoked the TPP.

91. Agents of Defendant SEARS, ROEBUCK AND CO. failed to advise the TPP beneficiaries and participants of the process for requesting TPP benefits.

92. Agents of Defendant SEARS, ROEBUCK AND CO. failed to advise the TPP beneficiaries and participants of their rights under ERISA.

93. The explanation provided for these failures by the Defendant SEARS, ROEBUCK AND CO. Manager of Policy, Communication and Benefits Compliance was that, *prior to any application for benefits*, IT WAS DETERMINED THAT NO HVAC SALES ASSOCIATES WERE ELIGIBLE FOR BENEFITS UNDER THE TPP.

94. Nonetheless, hundreds of HVAC Sales Associates requested TPP benefits.

95. EVERY SINGLE HVAC SALES ASSOCIATE, INCLUDING THE PLAINTIFFS, WAS DENIED TPP BENEFITS, regardless of the loss of paid time off and regardless of the distance between their home and home office.

96. It is clear that each of these denials was pre-planned as the alleged bases for the denials are manipulated and without basis in fact.

97. The denials uniformly admit that the TPP applied to the "integration of HVAC into the SHIP subsidiary."

98. The denials uniformly indicate the SHIP Sales Associate position is a "comparable job" despite the substantial differences stated above, and more.

99. The denial letters uniformly assume that the sales made by the associate under the SHIP model will be the same as the prior year with Defendant SEARS, ROEBUCK AND CO., despite the "one call close" rule, expansion of territories and the failure to reimburse expenses.

100. The denials uniformly misstate the benefit rate for the previous year while employed by Defendant SEARS, ROEBUCK AND COMPANY.

101. The denials uniformly posit a one per cent commission increase under Defendant SHIP (which it then estimates as being an increase of approximately ten per cent of the projected earnings).

102. Despite representations to the contrary, commission rates for certain products were *decreased* after the "transition" and there was no universal one per cent increase.

103. The early denials also posit a "closing bonus earnings" amount and a "net volume bonus earnings" amount, together comprising approximately eight per cent of the total estimated SHIP earnings.

104. Both bonus programs were "suspended" at or near the time of "transition" and were "under review" at the time of the TPP benefit denials.

105. Later denial letters excluded the bonuses as part of the calculations.

106. The hypothetical bonus amounts used to deny the TPP benefits never materialized.

107. The denials also uniformly evaded the reasonable commute qualification by 1) assuming that the thirty mile reasonable commute definition meant one way, and then 2) stating (without basis) that the Sales Associate would be required by Defendant SHIP to commute only that many times per week that would not exceed the limit. For example, Plaintiff NOVAK lives forty miles from her designated home office. Driving forty miles per day five times per week would require a 200 mile per week commute, one way – clearly outside the defined parameters of a reasonable commute under the

TPP. Nonetheless, she was advised (without basis) that she would not be required to travel to the home office more than one time per week, and thereby denied TPP benefits.

108. The alleged bases for the universal denial of TPP benefits to HVAC Sales Associates, including the Plaintiffs and those similarly situated, are not founded in reality, not true, and constitute deliberate misrepresentations, intentionally designed to interfere with federally protected rights of the Plaintiffs and those similarly situated.

109. The foregoing constitutes a fixed policy of denying TPP benefits to HVAC Sales Associates, as admitted by Defendant SEARS, ROEBUCK AND CO., thereby rendering futile any efforts of the remainder to exhaust their administrative remedies under the TPP.

V. CLASS ALLEGATIONS

110. These claims are properly subject to class treatment pursuant to Fed. R. Civ. Proc. 23.

111. The class consists of all HVAC Sales Associates with a minimum of one year of service with Defendant SEARS, ROEBUCK AND CO., at the time of the "transition" to Defendant SHIP.

112. *Numerosity.* The number of plan participants (the proposed class) is approximately five hundred and fifty, located throughout the United States, such that joinder of all claims is impracticable.

113. *Commonality.* There are questions of law and fact common to all class members. Plaintiffs allege: breaches of fiduciary responsibility to act in the interests of the participants and beneficiaries of the TPP and violations of ERISA by (a) determining

that no Sales HVAC Associate would receive benefits regardless of the basis therefore, (b) adopting baseless "interpretations" of the TPP that were applied class-wide, and (c) wrongfully and systematically denying benefits for same or similar reasons class-wide.

114. *Typicality.* The claims of each of the named plaintiffs are typical of the claims of all class members because: (a) they were identically situated as HVAC Associates, (b) they all received the same compensation package as HVAC Associates, (c) they all were similarly situated with respect to the terms and conditions of their employment as HVAC Associates, (d) they were all terminated by Defendant SEARS, ROEBUCK AND CO., (e) they were all eligible for TPP benefits, (f) they all were denied TPP benefits, (g) they all challenge the systematic denial of TPP benefits.

115. *Adequacy of Representation.* All of the named Plaintiffs are adequate representatives of the class because: (a) they are willing to represent the proposed class and have every inventive to pursue this action to a successful conclusion; (b) their interests are not in any way antagonistic to those of the other class members; and (c) they have engaged qualified counsel to represent them.

116. *Propriety of Class Certification Under Fed. R. Civ. P. 23(b)(1)(A) and (B).* Class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(A) and (B). As set forth above, common issues are presented. A substantial number of separate actions almost certainly would be brought against the defendants in the absence of a class action. If plaintiff were independently to bring suits against the defendants, and if the courts were to grant relief in some actions and not in others, there is a risk that conflict would arise relative to interpretation of plan language and entitlement to payments under the plan. Moreover, inconsistent judgments regarding the ERISA violations herein alleged will

affect all class members because they were all participants in, beneficiaries of and/or covered by the TPP and the rights of all the class members under the TPP were affected by Defendants' systematic, wrongful denial of benefits.

117. *Propriety of Class Certification Under Fed. R. Civ. P. 23(b)(2).* Class certification is appropriate where, as here, Defendants denied benefits on grounds generally applicable to the full class.

118. *Propriety of Class Certification Under Fed. R. Civ. P. 23(b)(3).* Class certification is also appropriate where, as here, questions of law and fact common to the class predominate over questions affecting only individual members. A class action is superior to other available methods for the fair and efficient adjudication of this litigation. Requiring each class member to pursue his or her claim individually would entail needles duplication, would waste the resources of both the parties and the Court, and would risk inconsistent adjudications.

VI. ERISA VIOLATION

Count I – Wrongful Denial of Benefits

119. 29 U.S.C. 1132 (a)(1)(B) permits recovery of benefits due under an ERISA benefits plan.

120. None of the HVAC Sales Associates were offered comparable work as defined by the TPP, as a result they were entitled to TPP benefits.

121. Under the terms of the TPP, benefits were due to HVAC Sales Associates, including the Plaintiffs and those similarly situated to them, in the amount of one week of pay at their benefit rate for each year of service completed.

122. All HVAC Sales Associates were denied TPP benefits.

123. The TPP is self-funded by Defendants.

124. Defendants' determination to deny TPP benefits was fixed, intentional, and easily meets the arbitrary and capricious standard applied to denial of benefit claims.

125. Defendants' denial of benefits to Plaintiffs and those similarly situated to them violates 29 U.S.C. 1132 (a)(1)(B).

126. As a direct and proximate result of the wrongful denial of TPP benefits, Plaintiffs and those similarly situated have suffered damages, to wit: unpaid TPP benefits and interest thereon.

VII. PRAYER FOR RELIEF

WHEREFORE Plaintiffs request, on behalf of themselves and those similarly situated:

- benefits due under the plan,
- interest, and
- attorneys' fees and costs in accordance with ERISA's fee-shifting provision.

JURY DEMAND

Plaintiffs hereby request a trial by jury.

Respectfully submitted,

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